Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

DAVID LEE DAVIS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When an Appellate Court finds prejudicial error of law (namely: the trial court's failure to dismiss 13 felony drug charges upon Petitioner's Rule 29 Motion), reverses the trial court's judgment of conviction and, remands the case for further proceedings in accordance with law, was the trial court correct in granting Petitioner a new trial on the remaining two weapons counts where the prejudicial influence of said 13 felony drug charges created a fundamental unfairness as to deny Petitioner's Constitutional rights to due process and a fair trial on those two weapons counts?

II. Having ordered that Petitioner be granted a new trial, with the complete agreement of Respondent, was the trial court without authority to vacate its order *sua sponte* more than 18 months later and impose sentence, without a new trial?

III. Shall the Ohio Supreme Court be permitted to deny Constitutional Due Process and ignore this Court's decision in *Smith v. Ohio,* 494 U.S. 541 (1990) which held: a warrantless search which provides probable cause for arrest cannot be justified as a search incident to arrest?

IV. Was the denial of Petitioner's Constitutional right to confront and cross-examine the prosecution witness who ordered that he be stopped and arrested and, that his property be searched and seized prejudicial error which requires Petitioner's convictions to be reversed and remanded for a new trial since a reasonable jury might have received a significantly different impression of the witness' credibility if such cross-examination had been allowed?

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I. The appellate court found prejudicial error of law (namely: 13 drug charges wrongfully identified as "felonies" and, illegally paraded before the jury throughout the trial and into their deliberations).

It reversed the entire judgment of the trial court and, remanded the case for further proceedings in accordance with law.

The prejudicial influence of said 13 "felony" drug charges upon Petitioner's jury created such fundamental unfairness that Petitioner's Constitutional rights to due process and a fair trial were denied. In short, Petitioner never had a fair trial.

Under these circumstances, the minimum relief to which Petitioner was entitled is a new trial on the remaining two weapons counts..... 12

II. Under the circumstances of this case, the trial court properly exercised its discretion by ordering that Petitioner be granted a new trial.

Having done so, the trial court had no authority to vacate its order *sua sponte* more than 18 months later and impose sentence, without a new trial.

The trial court's action in vacating its prior orders, *sua sponte* was arbitrary and, an abuse of its discretion.

Respondent, having agreed with trial court's orders granting a new trial, waived any objection to the new trial and, must be precluded from reversing its position 17

III. The People of the State of Ohio are in greater danger now than they were before this Court rendered its decision in *Smith v. Ohio,* 494 U.S. 541 (1990) because the Ohio Supreme Court has continued to summarily deny Constitutional Due Process with a deliberate and wanton disregard for this Court's decisions which have held: a warrantless search which provides probable cause for arrest cannot be justified as a search incident to arrest.

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IV. The Sixth Amendment's right of an accused to confront and cross-examine the witness against him is a fundamental right, essential to a fair trial and, made obligatory on the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

To deny an accused the right of effective cross-examination would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The denial of this Petitioner's right to cross-examine a witness against him and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness was prejudicial error which requires that Petitioner's convictions be reversed "since a reasonable jury might have received a significantly different impression of the witness' credibility if such cross-examination had been allowed." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1986) 24

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Petitioner David Lee Davis respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Ohio which denied Petitioner leave to appeal on June 29, 1994 and, which dismissed his appeal from the Franklin County Court of Appeals judgment rendered on January 7, 1994.

Petitioner further prays this Court, on certiorari, to consider the substantial federal questions determined by the lower courts at earlier stages in the litigation and appeal of this case.

OPINIONS BELOW

On October 3, 1989, Petitioner was convicted of 15 counts of his Indictment [two counts for carrying weapons and thirteen counts for possession of "dangerous drugs"]. A copy of the trial court's Entry is attached as Appendix M.

On September 4, 1991, the Franklin County Court of Appeals reversed the judgment of conviction and remanded the case for further proceedings in accordance with law. Copies of the Journal Entry of Judgment and Opinion of that appellate court are attached as Appendices K and L.

The trial court granted Petitioner a new trial on the remaining two weapons counts, with the complete agreement of Respondent; and then, repeatedly continued the trial date. Copies of its Entries are attached as Appendices E-H & J.

On April 21, 1993, the trial court vacated its previous orders *sua sponte* and imposed sentence upon Petitioner, without a new trial. A copy of its Amended Entry is attached as Appendix D.

On January 7, 1994, the Franklin County Court of Appeals affirmed. Copies of its Journal Entry of Judgment and Opinion are attached as Appendices B and C.

On June 29, 1994, the Supreme Court of Ohio denied Petitioner leave to appeal. That Court's *Entry* is attached as Appendix A.

THE JURISDICTION OF THIS COURT

The Entry of the Supreme Court of Ohio was filed on June 29, 1994 and, this Petition was timely filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

In addition, pursuant to *Reece v. Georgia*, 350 U.S. 85 (1955), this Court has jurisdiction, on certiorari, to consider all substantial federal questions determined at earlier stages of litigation and appeal. In this case, those substantial federal questions are set forth as *Questions Presented* III. and IV. (page i) of this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth and, Fourteenth Amendments to the Constitution of the United States, which provide, in pertinent part:

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.

Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and . . . to be confronted with the witnesses against him.

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 11, 1987, Petitioner was indicted for 19 felonies (5 counts of Carrying Concealed Weapons and 14 counts for possession of "dangerous drugs"). Petitioner pled not guilty. On August 8, 1988, Petitioner filed a Motion to suppress all physical evidence against him due to the illegality of the stop and search of his vehicle. After a hearing, the trial court overruled Petitioner's Motion to suppress. A copy of the trial court's December 8, 1988 Journal Entry is attached as Appendix N.

Petitioner's jury trial began on August 14, 1989. After the State rested, the trial court dismissed four counts (3 guns and 1 drug) on Petitioner's Rule 29 Motion. Fifteen counts of the Indictment were submitted to the jury and, Petitioner was convicted and sentenced for those 15 counts of his Indictment (2 guns and 13 drugs). A copy of the trial court's October 3, 1989 Entry of conviction is attached as Appendix M.

Petitioner immediately appealed to the Franklin County Court of Appeals. That appellate court found that the Indictment charged 14 misdemeanor drug offenses, not 14 felonies; and, that the trial court committed prejudicial error by overruling Petitioner's Rule 29 Motion to dismiss all of the drug counts. However, that appellate court overruled Petitioner's first assignment of error regarding his motion to suppress. Copies of the Franklin County Court of Appeals' September 4, 1991 Journal Entry of Judgment and August 29, 1991 Opinion are attached as Appendices K and L. Said Journal Entry of Judgment Ordered:

> [T]he judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

On September 27, 1991, Petitioner filed a Notice of Appeal to the Ohio Supreme Court and, so notified the trial court. With the agreement of counsel for both parties, on October 3, 1991, the Common Pleas Court filed its agreed Entry which ordered:

> For good cause shown and upon written motion the above styled cause is hereby reassigned for jury trial on counts 15 and 16 of the indictment from 17 October 1991 until such time as the Ohio Supreme Court has rendered its judgment on Defendant's appeal to that court.

A copy of that agreed Entry attached as Appendix J.

On January 29, 1992, the Supreme Court of Ohio denied Petitioner leave to appeal. A copy of that Court's Entry is attached as Appendix I.

On May 29, 1992 and August 13, 1992, counsel for both parties agreed to continue the new trial date. Agreed Entries were filed. Copies are attached as Appendices G & H.

On September 14, 1992, the trial court again continued the new trial date. A copy of the Entry is attached as Appendix F.

Another agreed Entry was approved by counsel for both parties and filed on January 6, 1993 continuing the new trial until further order of the court and, ordering Petitioner's counsel to notify the Court on March 1, 1993 of Petitioner's status as to competency to stand trial. A copy of the Entry is attached as Appendix E.

The trial court then Ordered the Petitioner to appear on April 19, 1993. He did so, in a wheel chair, not in custody. The State's attorney announced:

> [T]he Defendant is to be sentenced on counts 15 and 16, and that sentence being that which was given to

> him originally (October 2, 1989), two years concurrent to each other.

Defense counsel responded:

> [T]he Defendant is entitled to a new trial on two counts of CCW.
>
> The Court of Appeals, in the Opinion of August 29, 1991, stated that this court in its earlier judgment was reversed and (the) cause was remanded. At that point, the Common Pleas Court then scheduled this case for a new jury trial . . . Then the matter was continued . . .
>
> Your Honor, our position is, the facts have not changed in any way that would entitle this court to cancel a previously scheduled jury trial, and that the defendant should have a trial on those two counts (CCW).

At that April 19, 1993 hearing, the State offered no evidence and no argument; and, the trial court made no finding of fact nor conclusions of law to support its sudden reversal of its previous orders which all recognized Petitioner's Constitutional right to a new trial by an impartial jury.

In mitigation of sentence, Defense counsel reminded the trial court that this case was Petitioner's first offense, he had served as a volunteer auxiliary law enforcement officer and, he never threatened or harmed any person.

The trial court then imposed sentence: two years on each of the two counts of carrying concealed weapons, concurrent with each other. Its Amended Entry was filed on April 21, 1993. A copy is attached as Appendix D.

It was from that Amended Entry that the Petitioner appealed (again to the Franklin County Court of Appeals). That appellate court upheld the action of the

trial court. Copies of its January 7, 1994 Journal Entry of Judgment and its December 30, 1993 Opinion are attached as Appendices B and C.

On June 29, 1994, the Supreme Court of Ohio denied Petitioner leave to appeal. Appendix A.

This Petition was timely filed ninety (90) days later.

A. How the Federal Issues were raised and decided below.

In 1988, Petitioner filed a motion to suppress all physical evidence against him because it was seized in violation of the Fourth Amendment by means of an illegal stop and unreasonable searches of his vehicle.

At the suppression hearing, Det. Jester testified that, before she ordered his vehicle to be stopped, she knew all of the following: Petitioner's full name and home address (Transcript pages 16-18); that he was an Auxiliary Police Officer (Tr. p. 60); and, that he had a federal firearms license (Tr. pp. 55, 68-69). Jester further admitted that Petitioner did not violate any traffic laws and, she knew of no crime being committed in her presence when she ordered that his car be stopped (Tr. p. 57).

The police used an unmarked car, a marked cruiser and, a paddy wagon (Tr. p. 28) to stop the Defendant. The sole purpose of having the wagon there was to take Defendant into custody, not to investigate.

Jester testified that immediately after the stop, another police officer removed Petitioner from his car; Jester then looked in the passenger window and saw a gun; Petitioner was arrested; a third officer searched his car and found two more guns (Tr. pp. 28-30, 66-68). The above-detailed stop, search, arrest and second search were all done without any warrant.

The trial court found:

> (Police) had received reports from prostitutes that a large middle agedman, who drove a maroon Cadillac was picking up girls, injecting them with drugs, and having sex with them. . . .
>
> On October 2, 1987, detectives spotted the automobile and individual matching the description given them. The auto . . . picked up a known prostitute . . . later returned and the girl got out. The car was followed and subsequently stopped.

and on that basis, without citing any authority, it ruled that the stop was justified and the search was reasonable.

During the trial, the lower court denied Petitioner his Constitutional right to cross-examine Det. Jester.

Petitioner appealed both issues (and others) to the Franklin County Court of Appeals citing the Fourth and Sixth Amendments; *Katz v. U.S.*, 389 U.S. 347 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968); and, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). That appellate court cited *Terry* and found that the police had justified an "investigatory stop" with the following specific facts:

> Defendant and the vehicle which he was driving matched the description of "injectorman" given to Columbus police officers. Moreover, defendant's behavior was consistent with the allegations regarding "injectorman's" alleged conduct in the Short North area.

Opinion p. 5, hereto attached as Appendix L. That appellate court overruled Petitioner's assignment of error *Re:* the trial court's denial of his Constitutional right to cross-examine Det. Jester based on the trial court's "discretion." *Opinion* pp. 9-10.

The trial court then scheduled the case for a new trial so, Petitioner presented only one proposition of law to the Supreme Court of Ohio: "A warrantless search that provides probable cause for an arrest cannot be justified as an incident of that arrest;" and argued the application of the Fourth Amendment; *Smith v. Ohio,* 494 U.S. 541 (1990); *Katz, Terry* and, *Coolidge* to the facts of his case. Nevertheless, on January 29, 1992, the Supreme Court of Ohio denied Petitioner leave to appeal.

After the trial court vacated its previous orders (that Petitioner be granted a new trial) and *sua sponte* imposed sentence, without a new trial, Petitioner again appealed to the Franklin County Court of Appeals citing the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. That appellate court held:

> Defendant argues his rights to due process were violated by the trial court's failure to conduct a new jury trial on the carrying-a-concealed-weapon counts of the indictment. Only if the mandate of this court in *Davis, supra,* required a new trial would the trial court's actions constitute prejudicial error.

citing no authority. *Opinion* p. 3, copy attached as Appendix C. Petitioner presented its case to the Supreme Court of Ohio again, citing the same Constitutional provisions and numerous cases but, that court denied Petitioner leave to appeal.

B. Statement of Facts Material to the Questions Presented.

Although, during the suppression hearing, in an effort to justify her order to stop Petitioner's vehicle, Det. Jester testified at length about what the juvenile prostitutes told her about "Injectorman;" Jester was later forced to admit that the term "Injectorman" was

first coined after Petitioner was stopped and arrested (Tr. p. 71) in Appendix O.

Before his arrest, Defendant's "behavior" (as cited by the appellate court—Appendix L) consisted of driving slowly in heavy downtown Columbus traffic (Tr. p. 19); meeting, driving away with and then, returning home a woman who was not then personally known by Det. Jester to be any sort of criminal (Tr. p. 59); and then driving away alone.

At the trial, Respondent's witness, Det. Jester told the jury that she worked to help "exploited children." Petitioner's counsel was forbidden from presenting the following facts via cross-examination: Jester herself used juvenile prostitutes—for information. She knew that they were engaged in prostitution and drug abuse but, IF they gave her information, she would not arrest them, she would not take them to jail or to a juvenile detention home. She relied upon their information knowing that they would lie to her (Tr. pp. 42-49), in Appendix O.

On April 21, 1993, the lower court re-imposed sentence for two counts of carrying concealed weapons. At the 1989 trial, it was uncontested that one of those two weapons was Petitioner/Officer Davis' duty weapon; the other was in his glove box with $6745 cash receipts from his retail store. With that and other evidence, Petitioner established affirmative defenses to the CCW charges (Please see Ohio R.C. §2923.12 (C) (1) and (2)—in Appendix Q); and, he contends that he would not have been convicted of those two counts of carrying concealed weapons but for the prejudicial influence of said 13 felony drug charges which created a fundamental unfairness as to deny Petitioner's Constitutional rights to due process and a fair trial on those two weapons counts.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. The appellate court found prejudicial error of law (namely: 13 drug charges wrongfully identified as "felonies" and, illegally paraded before the jury throughout the trial and into their deliberations).

It reversed the entire judgment of the trial court and, remanded the case for further proceedings in accordance with law.

The prejudicial influence of said 13 "felony" drug charges upon Petitioner's jury created such fundamental unfairness that Petitioner's Constitutional rights to due process and a fair trial were denied. In short, Petitioner never had a fair trial.

Under these circumstances, the minimum relief to which Petitioner was entitled is a new trial on the remaining two weapons counts.

The Franklin County Court of Appeals, by its 1991 Entry (Appendix K), did not affirm any part of the trial court's 1989 conviction of Petitioner Davis. It "reversed the entire judgment of the trial court," as that appellate court later acknowledged in its 1993 Entry (p. 4) (Appendix B). "To 'reverse' means to set aside, annul, or vacate the judgment or order entered by the court below." 5 Am. Jur.2d *Appeal and Error* §948 (1962).

> The purpose of courts of appellate jurisdiction is to inquire whether the judgment of the trial court was erroneous when entered. If the appellate tribunal finds the judgment was erroneous and reverses it, that judgment is forthwith vacated and set aside, and no longer remains in existence. *The parties* are then restored to the position they held

> before the judgment was pronounced and *must take their places in the trial court at the point where the error occurred,* and proceed to a decision.

5 Am. Jur.2d *Appeal and Error* §955 (emphasis added). Here, "the point where the error occurred" was when the Indictment was filed since counts 1-14 were defective: they charged 14 felonies (that were really misdemeanors), as conceded by the State in the first appeal.

When the Court of Appeals ordered:

> [T]he judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

1991 Journal Entry, it did not enter Judgment; nor did it remand with directions to re-sentence Petitioner. Only two weapons charges remained "for further proceedings" by the trial court. The following principle of law applies:

> Absent a direction for the entry of final judgment or other action, a reversal may be treated as tantamount to the grant of a new trial . . . [I]t is the general rule that a retrial in civil or criminal proceedings may be had following a reversal without express provision therefor in the judgment of the appellate court. . . . All proceedings had under the judgment are, as between the immediate parties at least, ipso facto void and of no effect.

5 Am. Jur.2d *Appeal and Error* §955 (1962).

In this case, after they read the appellate court's 1991 *Opinion* and *Journal Entry,* Petitioner, Respondent and, the trial court all knew what "further proceedings" should be followed "in accordance with law consistent with said opinion." All agreed that Petitioner Davis should be granted a new trial on the two charges of CCW—counts 15 & 16 of the 1987 Indictment. *See* the trial court's October 3, 1991 *Entry* (Appendix J).

However, if, for the sake of argument, the trial court had had any such doubt, it properly exercised its discretion in favor of a new trial.

> Where the (U.S.) Supreme Court reversed the decision of the Court of Claims and its mandate required such court to proceed in the cause in conformity to law and justice, but the Supreme Court did not undertake to direct what law and justice required, the Court of Claims was free to grant a new trial.

Ex parte Medway (1875) 23 Wall. (U.S.) 504, 23 L. Ed. 160, as cited in 139 A.L.R. 340 *Right of trial court to grant new trial as affected by appellate proceedings* (1942).

> Where the judgment, order, or decree has been reversed without directions, or where there is merely such a general direction as that the trial court shall proceed in the cause in a manner not inconsistent with the decision of the appellate court, the trial court may grant a new trial . . . Moreover, it has been said that where there is a doubt as to what future proceedings are to be taken by the trial court after reversal, such doubt is generally resolved in favor of the power to grant a new trial.

139 A.L.R. at 350-51 (1942). Furthermore, 58 Am. Jur.2d *New Trial* §11 (1989) states:

> The power or authority to order a new trial was recognized early in the common law (1648), and is inherent in all courts of general common-law jurisdiction. . . . The broad discretion of a trial court to grant new trials does not deprive parties of a fair trial by jury but, on the contrary, assures it.

"A trial court has, by virtue of its inherent power, authority upon its own motion to set aside a verdict and grant a new trial." *Supra* §33, citing *Railway Co. v. Heck*, 102 U.S. 120 (1880). See also, *Commonwealth v.*

Jones, 303 Pa. 551, 154 A. 480 (1931), as reported by 85 A.L.R. 2d 486 *Propriety and effect as double jeopardy, of court's grant of new trial on own motion in criminal case.* §3 (1962).

Here, the 1991 appellate court found prejudicial error in the form of 13 "dangerous drugs" wrongfully paraded before the jury throughout the trial and into their deliberations as felonies when, by law, they were from the very beginning only misdemeanor offenses; and, all 14 such drug counts should have been dismissed at the close of the State's case on Petitioner's Rule 29 Motion. Given that background, the trial court's five Entries (Appendices E to H and J)—all of which ordered that Petitioner be granted a new trial were all legally correct. Petitioner was entitled to a new trial.

> Not all extraneous information considered by the jury in a criminal trial is so prejudicial as to require the granting of a new trial; *the standard (is) the defendant is entitled to a new trial IF it cannot be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.*[26] In some jurisdictions, prejudice is presumed where the jury considers extraneous material.[27] In determining whether prejudice is present, the character of the evidence is important.[28]

58 Am. Jur.2d *New Trial* §241 (1989). [26]*State v. Poland,* 132 Ariz. 269 (1982), later app. 144 Ariz. 388, 144 Ariz. 412, cert gr, in part 474 U.S. 816, motion gr 474 U.S. 943, and aff'd 476 U.S. 147, [28]*Aguirre v. State,* (Tex. App. San Antonio) 683 S.W. 2d 502 (1984).

In the present case, Petitioner Davis' jury considered extrinsic, prejudicial evidence throughout the trial and into its deliberations. If all of those drugs had been properly dismissed on Petitioner's Rule 29 Motion, they would not have hung over that jury like a dense

cloud obscuring Petitioner's affirmative defenses concerning his duty weapon which he carried as a volunteer auxiliary law enforcement officer and, his right to protect cash receipts from his retail store. *See,* Ohio R.C. §2923.12(C)—(Appendix Q).

Petitioner has consistently maintained (in the trial court and in both appeals to the Franklin County Court of Appeals) that he would not have been convicted of the two counts of carrying those two weapons, if not for the prejudicial effect of the 13 felony drug charges. It was those drug charges that made this citizen, with no prior criminal record, look like a criminal. In 1989 and today, most Americans believe: guns + drugs = crime. Furthermore: 2 guns + 13 or 14 "dangerous drugs" = major crime and danger. In Petitioner's trial, those drugs contaminated and corrupted the entire process obliterating any hope that he may have once had for a fair trial by an impartial jury. Due process of law as enshrined in the Fifth and Fourteenth Amendments to the Constitution of the United States requires that the Petitioner be granted a new trial on the only two charges which remain: the two counts of carrying concealed weapons (CCW).

II. Under the circumstances of this case, the trial court properly exercised its discretion by ordering that Petitioner be granted a new trial.

Having done so, the trial court had no authority to vacate its order *sua sponte* more than 18 months later and impose sentence, without a new trial.

The trial court's action in vacating its prior orders, *sua sponte* was arbitrary and, an abuse of its discretion.

Respondent, having agreed with trial court's orders granting a new trial, waived any objection to the new trial and, must be precluded from reversing its position.

This Court has held:

> [T]he order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause.

U.S. v. Ayers, 9 Wall. 609, 19 L. Ed. 627 (1870). *See also, U.S. v. Young*, 94 U.S. 258, 24 L. Ed. 153 (1977).

After the appellate court reversed and remanded the case by its 1991 Entry (Appendix K), Respondent approved and signed several Agreed Entries of the trial court which set and then, continued Petitioner's new trial (Appendices E-H and J).

The Ohio Supreme Court has held that where a new trial has been awarded upon appeal and a party has voluntarily submitted to such trial, he is deemed, after verdict and judgment in the last trial, to have waived the right to prosecute error to reverse the judgment of reversal. *Collins v. Davis*, 33 Ohio St. 567 (1878), and *Andrews v. Youngstown*, 35 Ohio St. 218 (1878). That principle should be applied here to preclude the State from challenging Petitioner's right to a new trial.

Under circumstances remarkably similar to the facts of the present case, *Smith v. Nogales,* 24 Ariz. 557 (1923) found that the parties had appeared without objection and agreed to the continuance of the hearing on defendant's motion for a new trial. Having done so, they were not permitted to object to the new trial on appeal. *In accord, Allen v. Lewis,* 26 Wyo. 85, 177 P. 433 (1919) where attorneys for both parties had agreed and consented in open court that the hearing on the new trial should take place, the parties waived any objection to hearing of the motion for new trial after expiration of the time prescribed by statute. *See also,* 67 A.L.R. 2d 191 *Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial* (1959); and, 3 A.L.R.3d 1191 *Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court.* (1965).

III. The People of the State of Ohio are in greater danger now than they were before this Court rendered its decision in *Smith v. Ohio,* 494 U.S. 541 (1990) because the Ohio Supreme Court has continued to summarily deny Constitutional Due Process with a deliberate and wanton disregard for this Court's decisions which have held: a warrantless search which provides probable cause for arrest cannot be justified as a search incident to arrest.

The People of every State in this Nation shall also be imperiled if this Court permits the Ohio Supreme Court to sanction official lawlessness and disregard *Smith v. Ohio* with impunity.

For more than 100 years, this Court has proclaimed: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532 (1886), as cited in *Mapp v. Ohio,* 367 U.S. 644, 647, 81 S. Ct. 1684, 1687 (1961). Now, once again, the sanctity of The Fourth Amendment to the Constitution of the United States must be safeguarded by this Court as the People's protection from unreasonable search and seizure.

In *Katz v. U.S.,* 389 U.S. 347, 88 S.Ct. 507 (1967), this Court held, "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." at 356. Those few exceptions must be specific, well justified, and closely scrutinized.

This Court has often repeated its long-standing instruction:

> The police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see e.g., *Katz* . . . in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . (such as) (hot pursuit) . . . or necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.

Terry v. Ohio, 392 U.S. 1, 20 (1968). In the present case, Respondent is unable to pass the *Terry* test which would authorize a limited, warrantless search after a lawful stop: IF "a *reasonably prudent man* in the circumstances would be warranted in the belief that his safety or that of others was in danger." at 27. That is, in part, because a reasonably prudent man in the circumstances of this case would have known all that Det. Jester knew before she ordered that Petitioner's car be stopped, (as he drove, in a lawful manner, alone, down a public street): Petitioner's full name, and home address (Transcript pp. 16-18); that he was an Auxiliary Police Officer (Tr. p. 60); and, that he had a federal firearms license (Tr. pp. 55, 68-69). In addition, like Jester, a reasonably prudent man in the circumstances of this case would have had no knowledge of a crime being committed before the stop and search (Tr. p. 57). Add the fact that Det. Jester's investigation lasted for months before she ordered that Petitioner's car be stopped; yet, despite the fact that she knew his name, his home address and, his place of business before the stop, in those months, she never attempted to obtain a positive identification of Petitioner by anyone who claimed that he had violated any law. Having failed to do so, it cannot be said that Det. Jester acted in a reasonable manner. Furthermore, a reasonably prudent man would have weighed his specific information about Petitioner's background as a law-abiding citizen (detailed

above) against the inexact information gathered from juvenile prostitutes who were known to abuse drugs and lie (Tr. pp. 45-46, 49). If such a balancing test had been performed, Petitioner would not be before this Court now. Clearly there was neither a lawful stop nor a lawful search of Petitioner's car.

Det. Jester had more than adequate time to secure a warrant; but, Petitioner presumes to speculate: if she had attempted to do so, upon the basis of the inexact, unsubstantiated information provided by informants whom she knew lied to her, no warrant would have been issued and, Petitioner would not be here now.

"[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief." *Berkemer v. McCarthy,* 486 U.S. 420, 436-37, 82 L.Ed.2d 317, 332-33 (1984), quoting *Delaware v. Prouse,* 440 U.S. 648, 653, 59 L.Ed.2d 660 (1979). The police officer who stopped Mr. Prouse had observed neither traffic nor equipment violations, nor any suspicious activity. This Court found that stop and detention to have constituted an unreasonable seizure in violation of the Fourth and Fourteenth Amendments. Even a brief stop and a visual inspection of those parts of the vehicle that are easily visible from the outside is not lawful under the Fourth Amendment unless the officers involved were aware of specific articulable facts, and inferences therefrom which reasonably warranted suspicion of a crime. *U.S. v. Brignoni-Ponce,* 422 U.S. 873, 45 L.Ed.2d 607 (1975).

In the instant case, there was no reasonable suspicion of criminal activity supported by articulable facts, as required to justify an "investigative stop" and search. The fact that Det. Jester saw a gun (in the car)

which was not, as a matter of law, illegal or concealed*, is irrelevant in light of the fact that Mr. Davis was attempting to exit the vehicle without the gun and Jester already knew he was a gun dealer and a police officer. The search that followed that observation was Constitutionally defective since an incident search may not both precede an arrest and also serve as its justification. *See, Smith v. Ohio.*

The plain view doctrine does not justify Respondent nor the lower courts' decisions. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971) defined a 3 prong test all of which must be met prior to the applicability of the plain view doctrine:

> 1) The initial intrusion bringing the police within the purview of the accused and, the results of the seizure must be justified prior to the intrusion;
>
> 2) *In the course of the already valid intrusion,* the police come across incriminating evidence they were not looking to seize before they arrived; and,
>
> 3) The evidence of illegality must be readily apparent.

Coolidge stated that plain view alone is never enough to justify the warrantless seizure because the justification for the initial intrusion that places one in a position to view must exist prior to plain view. In reviewing the above, this Court must be aware of the fact that Detective Jester got Petitioner's license number—not from an informant, but from a social worker who saw no crime but, merely picked it at random from the traffic on

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* That gun became the basis for Count 17 of Petitioner's Indictment. At trial, the trial court granted Petitioner's Rule 29 Motion and dismissed Count 17 due, in part, to the fact that the gun was not concealed and therefore, it did not constitute a violation to Ohio R.C. 2923.12 "Carrying concealed weapons."

the street (Tr. pp. 16-17). Again, Detective Jester had no right to stop Petitioner. Since her intrusion into his privacy was invalid, the fruits of her illegal searches must be suppressed.

Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) clearly and unequivocally held that the circle—where the search justified the arrest and the arrest justified the search—was unconstitutional. The ruling now before this Court is in direct violation of the clear mandate of *Smith v. Ohio.* This case breaks down as follows: an arbitrary traffic stop, which is not supported by any underlying violation of statute or ordinance; followed by a search (gun sighted), arrest (for possession of that gun), and yet another search for more guns—a scenario condemned by *Smith v. Ohio.*

This Court has told the nation that the practice of Ohio courts of allowing such conduct by the police is unconstitutional. How long will the Ohio Supreme Court and its lower courts be permitted to ignore the law of the land?

Without rules there is anarchy; when the police are not bound by rules there is oppression and a police state results. The police do not have the authority to change or override the Constitution of the United States. A failure by the courts to enforce constitutional rights confers such authority upon the police and the courts have no such power.

Here, an illegal stop was followed by an illegal search and seizure. Petitioner's motion to suppress all evidence herein as the fruits of an illegal search and seizure should have been sustained.

IV. The Sixth Amendment's right of an accused to confront and cross-examine the witness against him is a fundamental right, essential to a fair trial and, made obligatory on the states by the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

To deny an accused the right of effective cross-examination would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The denial of this Petitioner's right to cross-examine a witness against him and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness was prejudicial error which requires that Petitioner's convictions be reversed "since a reasonable jury might have received a significantly different impression of the witness' credibility if such cross-examination had been allowed." *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431 (1986).

Although the State tried to portray Det. Jester to the Jury as someone who worked to protect "exploited children," (as a result of Jester's testimony at the suppression hearing), Petitioner's counsel knew all of the following:

1) Jester knew the juvenile prostitutes were using drugs on a regular basis (Tr. pp. 42-44);

2) Jester used them to get information (Tr. p. 48);

3) Jester did not arrest them, or take them to jail or to a detention home, even if she had a warrant, IF they gave Jester information (Tr. p. 49).

4) She knew that they would lie to her; yet, she relied on their information (Tr. 49); and,

5) She just left them on High Street knowing probably that day they would engage in prostitution and use drugs (Tr. pp. 45-46).

Armed with a copy of the transcript of Jester's sworn testimony at the suppression hearing, Petitioner's counsel attempted to cross-examine Det. Cathy Jester at trial by asking, "You left them (juvenile prostitutes) on the streets knowing they were engaging in prostitution and drugs?" (Trial Tr. p. 122). Counsel for Respondent objected and the trial court sustained the objection. Petitioner's counsel's immediate request to approach the bench was denied. The trial court then refused to state why the objection had been sustained (Trial Tr. p. 123).

Shortly thereafter, the witness was excused and the trial was adjourned for the evening (Trial Tr. pp. 126-27). Petitioner's counsel then proffered:

> Cathy Jester would have testified to the following things which I consider to be extremely important for the purpose of this trial and in front of the jury, and they are as follows: We can pretty much identify our juvenile prostitutes, we know who they are, we see them on the streets and we know if there are warrants and we talk to them to see what's going on and we know they're prostituting; but we don't arrest the juveniles on warrants or if they are missing, we have pictures of them and we know their names but we leave them on High Street knowing that probably that day they will engage in prostitution and/or use of drugs . . .
>
> So we get the information out of them; that they know the people will in fact lie; and then finally said even if there was a warrant on one of the juvenile prostitutes giving her information, certainly we will not take them to jail and she does not want them arrested.

(Trial Tr. pp. 128-129); and Defense counsel argued:

> I believe Mr. Davis has an absolute right to have the jury know the answers to those questions because this can seriously affect the credibility of that witness, and the jury should have the ability to make a fair and impartial verdict in this case.

(Trial Tr. p. 129).

By the standards set forth in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1986), the trial court's restriction upon Petitioner's Sixth Amendment right to cross-examine Jester was prejudicial error. Det. Jester's testimony was important to Respondent. It was her investigation, her order to stop and, her initial search that began this entire case. The only testimony available to Respondent with which he could directly challenge and contradict Jester's trial testimony was the above-detailed information which he obtained at the suppression hearing.

A typical, reasonable jury includes parents of minor daughters and, other persons concerned with the tragic lives of exploited children. In this case, the jury should have been permitted to hear her admit that she exploits children, using them for information and then, she abandons them to a life of prostitution and drug abuse (Tr. pp. 42-49). By the law of *Delaware*, they would have received "a significantly different impression of the witness' credibility if such cross-examination had been allowed."

In addition to the credibility of Det. Cathy Jester, the credibility and motivation of the teen prostitutes was at issue. Why would they lie? The answer that the trial court withheld from the jury was: to avoid their own arrest and jail.

When another defense counsel's attempted cross-examination of a victim-witness (designed to elicit inconsistencies between that witness' testimony and his pre-trial statements) was frustrated, the Ohio Supreme Court held:

> Any abrogation of the defendant's right to a full and complete cross-examination of such a witness is a denial of a fundamental right essential to a fair trial and is **prejudicial per se.** *Pointer v. Texas,* 380 U.S. 400 (1965); *Martin v. Elden,* 32 Ohio St. 282 (1877); *State v. Huffman,* 86 Ohio St. 229 (1962).

State v. Hannah, 54 Ohio St.2d 84, 86-87, 8 Ohio Ops.3d 84, 88 (1978).

Wherefore, Petitioner prays for a reversal of his convictions and the restoration of his Sixth Amendment rights to confront and cross-examine the witnesses against him, a right that is essential to a fair trial.

CONCLUSION

This case involves a wilful failure by the trial court to follow the law as it has been repeatedly explained by this Court; and, a denial of Petitioner's Constitutional rights to due process, to a trial by an impartial jury and, to confront and cross-examine his chief accuser. The trial court's misconduct in this case has been sanctioned by the Ohio Supreme Court.

That decision must not stand. Mr. Davis prays that this Honorable Court will restore his Constitutional rights and, in doing so, protect the rights of all who have been, are now or, may, at some time in the future, become persons accused of crime.

For all of the reasons detailed above, a Writ of Certiorari should issue to review the judgment of the Ohio Supreme Court. If this Court finds that a full review is unnecessary in view of the clear conflict between the judgment of the Ohio Supreme Court and this Court's prior decisions, Petitioner prays this Honorable Court will summarily reverse the judgment of the Ohio Supreme Court.

Respectfully submitted,

DIANE MARIE KAPPELER DEPASCALE
Counsel of Record
786 Northwest Boulevard
Columbus, Ohio 43212
Telephone: (614) 298-8200
Attorney for Petitioner

APPENDIX A

ENTRY OF THE SUPREME COURT OF OHIO

(June 29, 1994)

1994 TERM

To wit: June 29, 1994

Case No. 94-358

STATE OF OHIO,
Appellee,

v.

DAVID LEE DAVIS,
Appellant.

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Diane M. Kappeler DePascale.

(Franklin County Court of Appeals; No. 93AP618).

THOMAS J. MOYER
Chief Justice

APPENDIX B

JOURNAL ENTRY OF JUDGMENT OF THE FRANKLIN COUNTY COURT OF APPEALS

Case No. 93-AP-618

(January 7, 1994)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 93AP-618

(REGULAR CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID LEE DAVIS,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on December 30, 1993, defendant's sole assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, BOWMAN & FARMER, *JJ.*
By JUDGE ALBA L. WHITESIDE

FARMER, *J.*, of the Fifth Appellate District, sitting by assignment in the Tenth Appellate District.

cc: Katherine Press, APA
Diane M. Kappeler

APPENDIX C

OPINION OF THE FRANKLIN COUNTY COURT OF APPEALS

Case No. 93-AP-618

(December 30, 1993)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 93AP-618

(REGULAR CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID LEE DAVIS,
Defendant-Appellant.

O P I N I O N

Rendered on December 30, 1993

Michael Miller, Prosecuting Attorney, and *Katherine Press,* for appellee.

Diane M. Kappeler, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

WHITESIDE, *J.*

Defendant, David Lee Davis, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of two counts of carrying a concealed weapon. Defendant presents the following assignment of error:

> "The trial court denied defendant/appellant's federal and Ohio constitutional rights to due process and to a trial by jury when it reversed all of its earlier decisions, which had properly set his case for (re)trial—decisions upon which defendant/appellant relied, and instead, sentenced him to two years incarceration. Thus, the trial court committed prejudicial and reversible error."

Defendant, following a jury trial, was convicted and sentenced on thirteen counts of possession of dangerous drugs and two counts of carrying a concealed weapon. Defendant appealed the trial court's judgment, presenting twelve assignments of error for review. This court in *State v. Davis* (Aug. 29, 1991), Franklin App. No. 89AP-1179 (1991 Opinions 4315), unreported, at 4329, reversed the judgment of the trial court and remanded the case for "further proceedings consistent with the law and this opinion." The journal entry of judgment was entered on September 4, 1991, and reads, as follows:

> "For the reasons stated in the opinion of this court rendered herein on August 29, 1991, the fourth, fifth, seventh, and twelfth assignments of error are sustained and the remaining assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court *for further proceedings in accordance with law consistent with said opinion.*" (Emphasis added.)

This entry was filed in the trial court as the mandate of this court on September 10, 1991. The next day, the assignment office of the Franklin County Court of Common Pleas sent a trial notice to defendant and his counsel notifying them that defendant's case had been set for "trial" on October 17, 1991. Defendant filed a motion for continuance, stating he intended to appeal to the Supreme Court of Ohio. The trial court granted defendant's motion by entry, which states in pertinent part: "*** the above styled cause is hereby re-assigned for jury trial on counts 15 and 16 of the indictment from 17 October 1991 ***."

The Supreme Court declined to hear defendant's appeal on February 19, 1992. On March 27, 1992, the assignment commissioner again sent defendant notice that his case was set for trial. On April 8, 1992, the state of Ohio filed a motion to enforce sentence, which it amended on June 3, 1992. After several continuances due to defendant's health, the matter was set for hearing on April 19, 1993, at which time the trial court reimposed its prior sentence on the two counts of carrying a concealed weapon. The court filed an amended entry on April 21, 1993, from which defendant filed a timely appeal.

Defendant argues his rights to due process were violated by the trial court's failure to conduct a new jury trial on the carrying-a-concealed-weapon counts of the indictment. Only if the mandate of this court in *Davis, supra*, required a new trial would the trial court's actions constitute prejudicial error. A review of this court's opinion in *Davis* indicates the trial court not only was not mandated, but was in effect ordered not to conduct a new jury trial on the carrying-a-concealed-weapon counts of the indictment. Therefore, defendant's due process rights were not violated.

The journal entry of judgment entered in *Davis* based on the court's opinion of August 29, 1991, reversed the judgment of the trial court, stating: "*** [T]his cause is remanded to that [common pleas] court for further proceedings in accordance with law consistent with said opinion." This court, in that previous opinion, found prejudicial error in the trial court's failure to grant defendant's Crim.R. 29 motion on the thirteen counts of possession of dangerous drugs, stating: "Given the fact the state failed to offer any evidence that defendant possessed dangerous drugs for sale at retail ***." *Id.*, at 4325. Furthermore, prejudicial error was found in the trial court's jury instructions and the sentence imposed on the charges of possession of dangerous drugs. However, that portion of the trial pertaining to the carrying-a-concealed-weapon counts was expressly found to be free of prejudicial error. This court in its previous opinion found no abuse of discretion by the trial court in allowing the jury to read previously given jury instructions on the carrying a concealed weapon charges. Furthermore, this court found:

> "*** [R]eversal is not warranted *** on the basis of the jury's verdict form since the language of the indictment was included in the charge to the jury and incorporated into the verdicts, the evidence that defendant carried such a weapon is great and defendant failed to object at trial as to the form of the verdicts." *Davis, supra,* at 4327.

Finally, in addressing whether defendant's conviction upon the two counts of carrying a concealed weapon was against the manifest weight of the evidence, this court stated: "[W]e find that there exists sufficient evidence to support the jury's verdict that defendant was guilty of having violated R.C. 2923.12 [carrying a concealed weapon] ***." *Davis,* at 4328.

Therefore, while defendant correctly stated that our prior journal entry of judgment reversed the entire judgment of the trial court, it did not mandate a new trial. When read in context, our prior judgment reversed the trial court's judgment for the reasons set forth in our August 29, 1991 opinion and remanded the case for further proceedings in accordance with that opinion. This court expressly determined that the jury's verdict on the carrying-a-concealed-weapon charges was not against the manifest weight of the evidence and that no prejudicial error occurred in the jury-trial proceedings on those charges.

The mandated further proceedings obviously do not require a new trial on the carrying-a-concealed-weapon counts of the indictment when defendant has already been afforded his constitutional right to due process and a fair jury trial on those charges. This court's mandate to the trial court was to hold further proceedings in accordance with law and this "reversal and remand" were necessary since the trial court entered a single judgment as to all the charges and our finding insufficient evidence as to most of those charges (except the two carrying-a-concealed-weapon charges) necessitated a remand for resentencing on the carrying-a-concealed weapon charges. This court did not suggest, much less mandate, a new jury trial on the question of guilt of carrying a concealed weapon. Nor is defendant entitled to a new trial.

Although the record reflects the assignment commissioner notified defendant his case was set for "trial," and the trial court continued this "jury trial" by entry on October 3, 1991, neither the notice nor the interlocutory continuance entry entitles defendant to a new trial. The language utilized by the trial court appears to be mere ministerial error. Even if not, defendant's reliance on these entries does not "estopp"

the trial court from any action except a new jury trial. Rather, the mandate of this court on the prior appeal precludes defendant's receiving a new jury trial on the carrying-a-concealed-weapon charges of which he was convicted.

The trial court's delay in correctly implementing the mandate of our prior decision did not prejudice defendant. "Reliance" on erroneous entries does not create a right to a new trial if no such right exists. Even assuming defendant "chose" to waive his right to appeal certain issues to the Supreme Court based on the trial court's entries, such "reliance," if it exists, does not create a right to a new trial.

Defendant presents the argument that he is entitled to a new jury trial as the trial court's errors relating to the possession of dangerous drugs charges were so prejudicial that his conviction on two counts of carrying a concealed weapon was tainted. This argument should have been presented in defendant's first appeal on this matter. During oral argument, defense counsel stated the argument was, in fact, presented during the previous appeal. If so, it was considered by the court prior to its determination that prejudicial error did not occur in the trial proceedings relating to the carrying-a-concealed-weapon charges. If the argument was not raised, it is not properly before the court upon this appeal since all issues concerning the original conviction were determined by the first appeal.

For the foregoing reasons, defendant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and FARMER, *JJ.*, concur.

FARMER, *J.*, of the Fifth Appellate District, sitting by assignment in the Tenth Appellate District.

APPENDIX D

AMENDED ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(April 21, 1993)

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

JANUARY TERM, 1993

Case No. 87CR-10-3275

JUDGE: DAVID W. FAIS

INDICTMENT: CARRYING
CONCEALED WEAPON
(2923.12 R.C.)

STATE OF OHIO,
Plaintiff,

v.

DAVID LEE DAVIS,
Defendant.

AMENDED ENTRY

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 4, 1993.

On April 19, 1993 came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Diane M. Kappeler.

This cause is before the Court on remand from the Court of Appeals, Tenth Appellate District.

The Court finds that the Defendant was found Guilty of Counts XV and XVI, Carrying Concealed Weapon, in violation of Section 2923.12 Revised Code, being felonies of the third degree.

The Court afforded counsel an opportunity to speak on behalf of the defendant and addressed the defendant personally affording him an opportunity to make a statement in his own behalf and present information in mitigation of punishment.

The Court has considered all matters required by Sections 2929.12 and 2951.02 of the Ohio Revised Code, and it is the sentence of the Court that the Defendant pay the costs of this prosecution and be sentenced to the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS for a period of TWO (2) YEARS DETERMINATE SENTENCE ON EACH COUNT, WITH BOTH COUNTS TO BE SERVED CONCURRENTLY.

The Court has factually found that Defendant has 2 days of jail time credit and hereby certifies the same to the Ohio Department of Corrections. The defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

/s/ DAVID W. FAIS
David W. Fais
Judge
Common Pleas Court
Franklin County

Costs: $_____

TERMINATION NO. 5 By: TJ
Case No. 87CR-10-3275

APPENDIX E

AGREED ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(January 6, 1993)

Case No. 87-CR-10-3275

(Judge David Fais)

STATE OF OHIO,
Plaintiff,

v.

DAVID LEE DAVIS,
Defendant.

E N T R Y

Upon Motion of the Defendant, by and through his counsel, and for good cause shown, the jury trial of the above-captioned case, presently scheduled to begin on Monday, December 7, 1992, is hereby continued until further order of this Court.

Defense counsel is Ordered to notify this Court and the County Prosecutor on March 1, 1993 of the Defendant's status as to competency to stand trial.

SO ORDERED:

/s/ FAIS
Judge

Approved:

(signed 12/2/92)
Tim Mitchell
Assistant Franklin County Prosecutor
Franklin County Hall of Justice
369 S. High St.—5th Floor
Columbus, Ohio 43215

/s/ DIANE M. KAPPELER
Diane M. Kappeler
Attorney for Defendant
OH S. Ct. #0016654
4937 West Broad Street
Columbus, OH 43228
(614) 878-7257

APPENDIX F

ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(September 14, 1992)

IN THE COMMON PLEAS COURT
OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No. 87-CR-10-3275

(Judge David Fais)

STATE OF OHIO,
Plaintiff,

v.

DAVID LEE DAVIS,
Defendant.

E N T R Y

Upon Motion of the Defendant, by and through his counsel, and for good cause shown, the jury trial of the above-captioned case, presently scheduled to begin on Monday, September 21, 1992, is hereby continued to Dec. 7, 1992—9 a.m.

SO ORDERED:

/s/ FAIS
Judge

Tim Mitchell
Assistant Franklin County Prosecutor
Franklin County Hall of Justice

/s/ DIANE M. KAPPELER
Diane M. Kappeler
Attorney for Defendant
111 W. First St., Suite 518
Dayton, OH 45402-1131
(513) 223-0966

APPENDIX G

AGREED ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(August 13, 1992)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No.: 87CR-10-3275

Judge Fais

STATE OF OHIO,
Plaintiff,

v.

DAVID L. DAVIS,
Defendant.

E N T R Y

Upon Defendant's Motion and, for good cause shown, the jury trial of this case now scheduled to begin on Monday, August 10, 1992 is hereby continued.

SO ORDERED:

/s/ DAVID W. FAIS
Judge

8-5-92

Case continued to September 21, 1992 at 9:00 A.M.

Copy to: The County Prosecutor
/s/ TIM MITCHELL
and
/s/ DIANE M. KAPPELER
Diane M. Kappeler KAP 14
Defense Counsel
111 W. First St.—Suite 518
Dayton, OH 45402-1131

APPENDIX H

AGREED ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(May 29, 1992)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No. 87-CR-10-3275

Judge Fais

STATE OF OHIO,
Plaintiff,

v.

DAVID L. DAVIS,
Defendant.

E N T R Y

Upon motion of the Parties and for good cause shown, to wit: negotiations continuing this case, being set for trial on the 28 day of May, 1992, at 9:00 a.m., is hereby continued for reassignment to the 10th day of August, 1992 at 9:00 a.m.

Defendant waives the right to a speedy trial for the period of this continuance as to the pending charge or charges as well as any subsequent, additional charge or charges which may arise from the same set of facts and circumstances as the initial charge.

/s/ DAVID W. FAIS
Judge

5-28-92

APPROVED:

MICHAEL MILLER
Prosecuting Attorney
Franklin County, Ohio

/s/ TIM MITCHELL
Assistant Prosecuting Attorney
Counsel for the State of Ohio

/s/ DIANE M. KAPPELER
Attorney at Law
Counsel for the Defendant

/s/ DAVID L. DAVIS
Defendant

APPENDIX I

ENTRY OF THE SUPREME COURT OF OHIO

(January 29, 1992)

THE SUPREME COURT OF OHIO

1992 TERM

To wit: January 29, 1992

Case No. 91-2142

STATE OF OHIO,
Appellee,

v.

DAVID LEE DAVIS,
Appellant.

E N T R Y

Upon consideration of the motion for leave to appeal from the Court of Appeals for Franklin County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Docket Fee, $40.00, paid by Vincent DePascale.

(Court of Appeals No. 89AP1179).

/s/ THOMAS J. MOYER
Thomas J. Moyer
Chief Justice

APPENDIX J

AGREED ENTRY OF THE FRANKLIN COUNTY COMMON PLEAS COURT

Case No. 87CR-10-3275

(October 3, 1991)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No. 87CR-10-3275

Judge Fais

STATE OF OHIO,
Plaintiff,

v.

DAVID L. DAVIS,
Defendant.

E N T R Y

For good cause shown and upon written motion the above styled cause is hereby re-assigned for jury trial on counts 15 and 16 of the indictment from 17 October 1991 until such time as the Ohio Supreme Court has rendered its judgement on Defendant's appeal to that court.

/s/ DAVID W. FAIS
Judge

APPROVED:

/s/ per telecom 9-27-91
MIKE JAKUBOW
Attorney for Plaintiff

/s/ VINCENT DE PASCALE
Vincent De Pascale
Attorney for Defendant

/s/ DIANE M. KAPPELER
Diane M. Kappeler
Attorney for Defendant

APPENDIX K

JOURNAL ENTRY OF JUDGMENT OF THE FRANKLIN COUNTY COURT OF APPEALS

Case No. 89-AP-1179

(September 4, 1991)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

87-CR-10-3275

No. 89AP-1179

(REGULAR CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID LEE DAVIS,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 29, 1991, the fourth, fifth, seventh, and twelfth assignments of error are sustained and the remaining assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common

Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

McCormac, Bryant & Gerken, *JJ.*
By /s/ Thomas H. Gerken
Judge Thomas H. Gerken, of the
Hocking County Court of
Common Pleas, sitting by
assignment in the Tenth
Appellate District

cc: Joseph Edwards and
Katherine J. Press
Vincent DePascale
Diane M. Kappeler

APPENDIX L

OPINION OF THE FRANKLIN COUNTY COURT OF APPEALS

Case No. 89-AP-1179

(August 29, 1991)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 89AP-1179

(REGULAR CALENDAR)

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID LEE DAVIS,
Defendant-Appellant.

O P I N I O N

Rendered on August 29, 1991

MR. MICHAEL MILLER, Prosecuting Attorney, MR. JOSEPH EDWARDS and MS. KATHERINE J. PRESS, for appellee.

MR. VINCENT DEPASCALE; and MS. DIANE M. KAPPELER, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

GERKEN, *J.*

This is an appeal by defendant, David Lee Davis, from a judgment of the Franklin County Court of Common Pleas finding defendant guilty of thirteen counts of possession of "dangerous drugs" and two counts of carrying concealed weapons.

Between the period of April and October 1987, Columbus police officers assigned to the Exploited Children's Unit investigated an individual initially known to them as "injectorman," who frequented the Short North area of Columbus, picking up juvenile prostitutes, injecting them with drugs, and having sex with them. Juvenile prostitutes described the individual as a middle-aged, heavyset man with scars on his stomach and dark-rimmed glasses, who drove a maroon Cadillac. On or about September 3, 1987, a social worker assigned to the Exploited Children's Unit observed a man fitting the foregoing description in the Short North area. The license number of the car indicated that it was registered to Davis Corvette Sales and Service, a business owned by defendant. The police further determined that defendant was a Perry Township auxiliary police officer and a nurse-anesthetist, who was formerly employed at Lancaster-Fairfield Hospital.

On October 2, 1987, Columbus police officers observed defendant driving a maroon Cadillac in the Short North area. The officers then followed defendant and he eventually stopped in front of a house known to be used for prostitution and spoke with a young woman, Diane Slone. Slone and defendant left in defendant's car which the officers lost in traffic. Police officers then waited at Slone's house until defendant returned and dropped her off. Defendant was then stopped by the police officers who ordered defendant to exit his automobile, and at that time the police officers observed

a handgun by the automobile's armrest. Defendant was then arrested for carrying a concealed weapon. A further search of the automobile resulted in the discovery of two more handguns. A search warrant was obtained to search a black bag found in the backseat of defendant's car and a second search warrant was obtained to open a brown medical bag found in the automobile's trunk. Nine anesthetic drugs were found in the black bag, and five in the brown bag.

Defendant was then indicted on fourteen counts of possession of dangerous drugs and five counts of carrying concealed weapons. Following a trial before a jury, defendant was convicted for thirteen counts of possession of dangerous drugs and two counts of carrying concealed weapons.

On appeal, defendant has set forth twelve assignments of error for this court's review:

> "I. The court below erred in denying Defendant/Appellant's *Motion to Suppress* the evidence which was then admitted into evidence against him at trial.
>
> "II. The trial court's failure to sustain Defendant/Appellant's pre-trial *Motion to Consolidate* was prejudicial and reversible error.
>
> "III. The trial court denied Defendant/Appellant his constitutional rights to due process and to confront and cross-examine a witness who testified for the State: Det. Cathy Jester; and thus, the Court committed prejudicial and reversible error.
>
> "IV. The trial court erred by overruling Defendant/Appellant's Rule 29 *Motion* to dismiss Counts 1-6 and 8-14 of the Indictment for a failure to prove an essential element of the crime, to wit: possession for sale at retail.

"V. The trial court erred by refusing to Order that counts 1-14 of the indictment charged misdemeanors and not felonies, as a matter of law, and by imposing sentence for felonies rather than misdemeanors.

"VI. The trial court's refusal to instruct the jury on an essential element of the crime to wit: that Defendant/Appellant possessed such drugs for sale AT RETAIL was prejudicial and reversible error.

"VII. The trial court committed prejudicial and reversible error by refusing to properly instruct the jury on the 'presumptive evidence' despite Defense counsel's objection and request for a specific additional instruction in order to preserve the State's burden of proof of each essential element of the crime beyond a reasonable doubt.

"VIII. The trial court committed prejudicial and reversible error by failing to act in accord with its own ruling to *consolidate* the 13 then remaining drug counts, when that court gave the jury 26 separate verdict forms, stating separately each of the 13 counts for possession of *drugs,* as separate counts.

"IX. The trial court abused its discretion by failing to honor the jury's request (made during its deliberations) to read the court's 'instructions regarding the Affirmative Defenses of Carrying a Concealed Weapon.'

"X. The jury verdict was unsupported by the evidence, unreasonable, in violation of Defendant/Appellant's right to substantial justice and, therefore, contrary to the manifest weight of the evidence, as a matter of law.

"XI. The trial court denied Defendant/Appellant's Ohio and Federal Constitutional rights to Due Process by relying upon a Pre-Sentence Investigation (PSI) Report which

A) was not prepared as required by law and
B) was deliberately prejudicial to Defendant/Appellant.

"XII. The trial court had no legal authority to sentence Defendant/Appellant to serve consecutive sentences on drug counts #1-4, since all four drugs were possessed by Defendant/Appellant at the same time and place."

In his first assignment of error, defendant argues that the trial court erred in denying his motion to suppress evidence which defendant insists resulted from an illegal search and seizure. Defendant maintains that there existed no probable cause for the initial stop of his vehicle and that the affidavit supporting the issued search warrants was defective.

In *State v. Comen* (1990), 50 Ohio St. 3d 206, the Supreme Court of Ohio affirmed this court's decision finding that there existed sufficient justification for an investigatory stop of the defendant. The court again reiterated its position that an investigatory stop must be supported by a reasonable suspicion that the individual stopped is engaged in criminal activity. In order to justify an investigatory stop, the police officer must be able to point to specific and articulable facts which, when taken together with rational inferences to be drawn therefrom, reasonably warrant the stop. *Adams v. Williams* (1972), 407 U.S. 143; *Terry v. Ohio* (1968), 392 U.S. 1. Whether such a stop is proper is to be determined by a review of the totality of the surrounding circumstances at the time the stop is made. *State v. Bobo* (1988), 37 Ohio St. 3d 177; *State v. Freeman* (1980), 64 Ohio St. 2d 291; *Comen, supra.*

Given the facts presented in the record in this case, we are unable to conclude that the trial court erred in overruling defendant's motion to suppress the evidence

obtained as the result of the initial stop of defendant's vehicle. Defendant and the vehicle which he was driving matched the description of "injectorman" given to Columbus police officers. Moreover, defendant's behavior was consistent with the allegations regarding "injectorman's" alleged conduct in the Short North area. On this basis, it was reasonable for the trial court to conclude that the police officers had specific and articulable facts which provided a basis to stop defendant. Moreover, following the discovery of the handguns in defendant's car, police officers had probable cause to arrest defendant.

Defendant also argues that the search warrants issued were invalid on the basis that the supporting affidavit was inaccurate and included substantial amounts of hearsay. Defendant's argument is premised upon the Fourth Amendment to the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Accordingly, in order for a search warrant to be issued, there must exist probable cause which is supported by oath or affirmation.

In *Franks v. Delaware* (1978), 438 U.S. 154, the Supreme Court held:

> "*** [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false

> statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 155-156.

In further discussing a search warrant's supporting affidavit, the Supreme Court further held:

> "*** In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . .' Judge Frankel, *** put the matter simply: '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a *truthful* showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true. ***" (Citations omitted.) *Id.* at 164-165.

Following a review of the transcript of the suppression hearing, we are unable to conclude that the trial court erred in finding that defendant had failed to

adequately support his accusation that the affidavit was inadequate to support the search warrants which were issued. Our review of the social worker's affidavit which was attached in support of the search warrant, appears upon its face to have been made in good faith. Furthermore, the affidavit sets forth particular facts and circumstances which provide a basis for the existence of probable cause for the issuance of the search warrants in the present case.

Accordingly, defendant's first assignment of error is not well-taken and is overruled.

As defendant's second and eighth assignments of error are interrelated, this court will address them together. Defendant argues that the trial court erred when it refused to merge the five counts of carrying concealed weapons into one count and the fourteen counts of possession of dangerous drugs into one count prior to trial. R.C. 2941.25 provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

Under this statute, an individual may be indicted, tried, and found guilty of multiple offenses, even when they are allied offenses. *State v. Osborne* (1976), 49 Ohio St. 2d 135; *State v. Darga* (1985), 30 Ohio App. 3d 54.

The purpose of the allied offense statute is to prohibit the conviction for more than one allied offense. An individual is not convicted until a sentence is imposed. *State v. Henderson* (1979), 58 Ohio St. 2d 171. Therefore, if any of the counts do merge, merger is not required prior to sentencing. *Columbus v. Howard* (June 2, 1977), Franklin App. Nos. 77AP-109 and 77AP-110, unreported (1977 Opinions 1990). Since the trial court was not required to merge the counts prior to sentencing, we conclude that defendant's second and eighth assignments of error are not well-taken and are overruled.

Defendant next argues in his third assignment of error that the trial court improperly limited the cross-examination of detective Kathy Jester, a Columbus police officer. Specifically, defendant directs this court's attention to the following portion of the transcript:

> "Q. Is it not accurate to state that you did not take these girls off the street when you knew they were engaged in prostitution?
>
> "MR. EDWARDS: Your Honor, can we define what girl, you know, so—
>
> "Q. (BY MR. DEPASCALE): All right. Juvenile prostitutes under the age of 18 before their 18th birthday?
>
> "A. When we know girls are involved in prostitution we try by whatever means we can to get them off the streets. We do not arrest them for prostitution until just recently we have done that, but until recently we have not gone out to charge them with prostitution."
>
> "Q. Do you know some of these teenage prostitutes were engaging in drug usage?
>
> "A. We suspected they were, sure.
>
> "Q. You left them on the streets knowing they were engaging in prostitution and drugs?" (Tr. 122.)

While defendant is correct in his contention that he is entitled to confront and cross-examine witnesses against him, such right is not unlimited. See *State v. Walker* (1978), 53 Ohio St. 2d 192. We are unable to find that the trial court abused its discretion by sustaining an objection to this last question which inaccurately restated what the witness had said. *State v. Hymore* (1967), 9 Ohio St. 2d 122. Accordingly, defendant's third assignment of error is not well-taken and is overruled.

In his fifth assignment of error, defendant argues that the trial court erred in sentencing defendant on Counts 1 through 14 of the indictment as felonies instead of misdemeanors. The state has conceded in its brief that this assignment of error should be sustained. The indictment in the present case charged defendant with violating R.C. 4729.51 which limits those persons who may sell, purchase, distribute, or deliver dangerous drugs. This statute contains five separate subsections which contain differing penalties. See R.C. 4729.99. In failing to state in the indictment that defendant had acted in violation of R.C. 4729.51(C), the sole subsection which constitutes a felony, the indictment must be construed against the state and therefore defendant should not have been convicted and sentenced on the felony charges. Accordingly, defendant's fifth assignment of error is well-taken and is sustained. Defendant's sixth assignment of error, which argues that the trial court should have included an additional instruction regarding the drug charges, is overruled, given the foregoing. Defendant argues in his twelfth assignment of error that his sentences on possession of dangerous drugs should be vacated. Given our disposition as to defendant's fifth assignment of error, defendant's twelfth assignment of error is well-taken and is sustained. Given the fact that the state failed to offer

any evidence that defendant possessed dangerous drugs for sale at retail, we find defendant's fourth assignment of error to be well-taken and it is therefore sustained.

In his seventh assignment of error, defendant argues that the trial court improperly instructed the jury as follows:

> "The possession by any person of dangerous drugs shall constitute presumptive evidence that such person possesses the dangerous drug for sale. This presumption, ladies and gentlemen of the jury, may be rebutted." (Tr. 436-437.)

The state concedes that defendant's seventh assignment of error should be sustained on the basis of the United States Supreme Court's decisions in *Francis v. Franklin* (1985), 471 U.S. 307, and *Sandstrom v. Montana* (1979), 442 U.S. 510. Since the trial court improperly instructed the jury, we find defendant's seventh assignment of error to be well-taken and it is therefore sustained.

In his ninth assignment of error, defendant argues that the trial court should have permitted the jury to reread the trial court's instructions regarding the affirmative defenses of carrying a concealed weapon. However, the decision to allow the jury to rehear testimony or instruction is left within the sound discretion of the trial court. See *State v. Carver* (1972), 30 Ohio St. 2d 280; *State v. Weind* (1977), 50 Ohio St. 224; *State v. Higgins* (Apr. 5, 1990), Franklin App. No. 88AP-633, unreported (1990 Opinions 1376). Moreover, this court has recognized that a trial court need not reduce its instructions to writing but may elect to do so if in its discretion the trial court determines that written instruction would assist the jury. See *State v. Wyche* (Feb. 21, 1989), Franklin App. No. 87AP-878, unreported (1989 Opinions 388). As it does not appear from the

record that the jury's question that it was confused regarding the instructions previously given, we are unable to conclude that the trial court abused its discretion when it refused to allow the jury to read instructions previously given. Accordingly, defendant's ninth assignment of error is not well-taken and is overruled.

In his tenth assignment of error, defendant first argues that the jury's verdict form was insufficient to support his conviction for carrying a concealed weapon. Specifically, defendant argues that he was charged with and convicted of violating two counts of R.C. 2923.12 in that he did "knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordinance." However, defendant points out that the jury's verdict form stated that it found defendant guilty of simply carrying a concealed weapon. Defendant argues that the jury's failure to find that defendant carried a concealed "deadly weapon" requires reversal of his conviction.

Prior to deliberations, the jury was instructed on each necessary element of carrying concealed weapons. Specifically, the court instructed the jury as follows:

> "A deadly weapon is concealed when it is out of sight or so hidden that it cannot be seen by ordinary observation by others near enough to see it.
>
> "Deadly weapon means any instrument, device or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon. You must also determine whether the state has proved beyond a reasonable doubt that the deadly weapon was a firearm which was loaded or for which the defendant had ammunition ready at hand.

> "A firearm is any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. Firearm includes an unloaded firearm and any firearm which is inoperable but which can readily be rendered operable." (Tr. 433-434.)

The jury's verdict forms state that it found defendant guilty of carrying concealed weapons, as charged in the indictment, and specifically listed the weapon. We conclude that reversal is not warranted in the present case on the basis of the jury's verdict form since the language of the indictment was included in the charge to the jury and incorporated into the verdicts, the evidence that defendant carried such a weapon is great and defendant failed to object at trial as to the form of the verdicts. See *State v. Woods* (1982), 8 Ohio App. 3d 56; *State v. Corkran* (1965), 3 Ohio St. 2d 125; *State v. Park* (1962), 174 Ohio St. 81.

Defendant next argues that he established an affirmative defense to the charges of carrying a concealed weapon as set forth under R.C. 2923.12(C). However, upon review of the evidence in the present case, we do not find that the jury's verdict is against the manifest weight of the evidence. As noted by the Supreme Court in its syllabus in *State v. DeHass* (1967), 10 Ohio St. 2d 230:

> "1. On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.
>
> "2. A reviewing court may not reverse a judgment of conviction in a criminal case in a trial court, where the record shows that a verdict of guilty was returned by a jury on sufficient evidence and where no prejudicial error occurred in the actual trial of the case or in the instructions given the jury by the court."

The burden of establishing an affirmative defense is on the defendant. There existed testimony that auxiliary police officers are not authorized to carry loaded firearms while off duty and that defendant was off duty at the time he was arrested. While defendant also argues that the state failed to present evidence as to defendant's possession of dangerous drugs for sale "at retail," this has already been addressed in our discussion regarding defendant's fifth assignment of error. As we find that there exists sufficient evidence to support the jury's verdict that defendant was guilty of having violated R.C. 2923.12, defendant's tenth assignment of error is not well-taken and is overruled.

Defendant next argues in his eleventh assignment of error that the trial court erred in sentencing him when it considered a presentence investigation report. Defendant insists that this report contained prejudicial material upon which the trial court improperly relied to impose a stricter sentence. Provided that a sentence is within the sentencing limits proscribed for a conviction, sentencing is left within the sound discretion of the trial court. *City of Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22; *State v. Longo* (1982), 4 Ohio App. 3d 136. Absent an abuse of discretion, the decision of the trial court will be affirmed upon appeal. *State v. Adams* (1980), 62 Ohio St. 2d 151; *State v. Tutt* (1988), 44 Ohio App. 3d 138. While defendant complains that the trial court improperly relied upon the presentence reports in the present case, and that such reliance requires reversal, we cannot agree. It has been recognized that a trial court may consider information which would normally be inadmissible at trial. *State v. Barker* (1978), 53 Ohio St. 2d 135; *Tutt, supra.* In the present case, the trial court heard the testimony presented at trial as well as trial counsel's statements on behalf of defendant prior to sentencing.

The trial court was made aware of the information which defendant claims was missing from the presentence report. Although defendant could have presented witnesses to correct what he felt were inaccurate statements contained within the presentence report, he chose not to do so. See *State v. Greer* (1988), 39 Ohio St. 3d 236. As we find no abuse of discretion by the trial court in sentencing defendant, we conclude that defendant's eleventh assignment of error is not well-taken and is overruled.

Based upon the foregoing, defendant's assignments of error four, five, seven, and twelve are well-taken and are sustained. Defendant's remaining assignments of error one through three, six, and eight through eleven, are not well-taken and are overruled. The judgment of the trial court is hereby reversed and this cause is remanded for further proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

McCormac and Bryant, *JJ.*, concur.

Gerken, *J.*, of the Hocking County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

APPENDIX M

ENTRY OF CONVICTION OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(October 3, 1989)

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

January Term, 1989

Case No. 87CR-10-3275

Judge DAVID W. FAIS

INDICTMENT: POSSESSION OF DANGEROUS DRUGS (4725.51 R.C.) (13 Counts); CARRYING CONCEALED WEAPON (2923.12 R.C.) (2 Counts)

STATE OF OHIO,
Plaintiff,

v.

DAVID LEE DAVIS,
Defendant.

E N T R Y

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 9, 1989.

On October 2, 1989 came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Vincent DePascale/Diane M. Kappeler.

The Defendant was tried to a duly empaneled and sworn Jury.

The Court finds that on August 18, 1989 the jury returned a verdict finding the Defendant, David Lee Davis, Guilty of Counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, and 14, to-wit, Possession of Dangerous Drugs, in violation of §4725.51 Revised Code, being felonies of the fourth degree, and further found the Defendant Guilty of Counts 15 and 16, to-wit, Carrying Concealed Weapon, in violation of §2923.12 Revised Code, being felonies of the third degree.

The Defendant, on August 18, 1989, was informed of the aforestated verdict.

The Court afforded counsel an opportunity to speak on behalf of the defendant and addressed the defendant personally affording him an opportunity to make a statement in his own behalf and present information in mitigation of punishment.

The Court has considered all matters required by Sections 2929.12 and 2951.02 of the Ohio Revised Code, and it is the sentence of the Court that the Defendant pay the costs of this prosecution and be sentenced to ORIENT CORRECTION AND RECEPTION CENTER for a period of TWO YEARS determinate sentence on each Count, Counts 15 and 16, CONCURRENT with each other, and CONCURRENT with the remaining Counts, and EIGHTEEN MONTHS determinate

sentence on each Count, Counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, and 14, , with Counts 1, 2, 3 and 4 to be served CONSECUTIVE to each other and Counts 5, 6, 8, 9, 10, 11, 12, 13 and 14 to be served CONCURRENTLY with each other and CONCURRENT with Counts 1, 2, 3 and 4,

The Defendant is to receive 2 days of jail time credit toward sentence. The defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

The Defendant was further notified of his right to appeal as required by Criminal Rule 32(A)(2).

/s/ DAVID W. FAIS
David W. Fais, *Judge*
COMMON PLEAS COURT,
FRANKLIN COUNTY

COSTS: $_____

APPENDIX N

JOURNAL ENTRY OVERRULING MOTION TO SUPPRESS OF THE FRANKLIN COUNTY COMMON PLEAS COURT

(December 8, 1988)

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No. 87CR-10-3275

JUDGE THOMAS MITCHELL
(BY ASSIGNMENT)

STATE OF OHIO,
Plaintiff,

v.

DAVID L. DAVIS,
Defendant.

JOURNAL ENTRY OVERRULING MOTION TO SUPPRESS

The Exploited Children's Unit of the Columbus Police, working with Children's Services, were trying to control teen age prostitution in the Short North area of Columbus, Ohio. When possible, they were trying to rehabilitate the teen agers and to prosecute adults who patronized them.

In the summer and fall of 1987, they had received reports from prostitutes that a large middle agedman, who drove a maroon Cadillac was picking up girls,

injecting them with drugs, and having sex with them. He was known only as the "The Injector Man." On September 3, 1987, a social worker observed a car and individual who fit the description and wrote down the license tag. The car had dealer's tags and was listed to a Davis Corvette Sales in Ashville, Ohio. The name on the business, "Lee Davis," was determined to be the owner of Davis Gun Store in Dublin, Ohio. Other prostitutes reported they had been to the gun store and had sex there.

On October 2, 1987 detectives spotted the automobile and individual matching the description given them. The auto was passing the short north area and, in fact, picked up a known prostitute; however the police lost the auto in traffic but it later returned and the girl got out. The car was followed and subsequently stopped. When the Defendant got out of the car, it was noticed that two handguns were partially concealed under the front center arm rest in the auto. Defendant was arrested for Carrying Concealed Weapons and an inventory was conducted. Another gun was found, $6745.00 in cash, and vials of drugs and syringes. After a warrant was obtained, a black bag in the trunk was searched and other drugs were found. Also found were 10 more guns, 36 clips, and 1,000 rounds of ammunition.

Was the original investigating stop justified. While the police did not know who was driving the car at the time, the car and occupant matched the description of one used in illegal activities. The stop was justified even though no specific traffic violation was observed. It is not uncommon for law abiding citizens to be stopped because their car was identical to a known stolen vehicle. This slight loss of freedom is justified for the protection of the general public. In this case, there was even more

reason to stop the car. The inventory search of the car, after observing the weapons, was justified and reasonable.

Motion to suppress is OVERRULED.

THOMAS W. MITCHELL, *Assigned Judge*

Copy to:
Rith Bash Mangini
Assistant Prosecuting Attorney
Vincent DePascale
Attorney for Defendant

APPENDIX O

PORTIONS OF TRANSCRIPT OF NOVEMBER 28 and 30, 1988 SUPPRESSION HEARING

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

Case No. 87CR-10-3275

STATE OF OHIO,
Plaintiff,

v.

DAVID L. DAVIS,
Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE THOMAS W. MITCHELL, JUDGE, ON NOVEMBER 28 AND NOVEMBER 30, 1988.

APPEARANCES:

THE HONORABLE MICHAEL MILLER, PROSECUTING ATTORNEY, FRANKLIN COUNTY, OHIO, BY RITA MANGINI, ASSISTANT PROSECUTING ATTORNEY,

ON BEHALF OF THE PLAINTIFF, STATE OF OHIO.

MR. VINCENT DEPASCALE, ATTORNEY-AT-LAW,

ON BEHALF OF DEFENDANT.

---

[16] THE WITNESS: AMY MCCLANAHAN SAW THE SUBJECT FITTING THE DESCRIPTION GIVEN ON SEPTEMBER 3RD, 1987 AT WEST FIRST AVENUE AND NORTH HIGH STREET.

Q. (BY MS. MANGINI) WHAT KIND OF CAR WAS HE IN AT THAT TIME?

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: A DARK MAROON CADILLAC ELDORADO.

Q. (BY MS. MANGINI) AND RENEE CASPER, DID SHE DESCRIBE THIS AUTOMOBILE IN MORE DETAIL THAN SHANNON CHRISTY HAD?

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: SHE SAID HE DROVE A MAROON CADILLAC AND A MAROON GRAND PRIX AND A WHITE VAN.

Q. (BY MS. MANGINI) WHICH AUTOMOBILE, IF ANY OF THOSE WERE OBSERVED BY AMY MCCLANAHAN?

A. SHE SAW THE CADILLAC.

Q. WAS SHE ABLE TO GET A DESCRIPTION OF THE INDIVIDUAL THAT WAS SUSPECTED TO BE THE INJECTOR MAN?

A. SHE SAW A HEAVY SET SUBJECT WITH DISHWATER—

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

[17] THE WITNESS: —WITH DISHWATER BLONDE HAIR DRIVING THE CAR.

Q. (BY MS. MANGINI) DID YOU GET A LICENSE PLATE NUMBER FROM THAT CAR?

A. YES.

Q. WHAT WAS THAT?

A. IT WAS A DEALER'S TAG WITH A NUMBER 3-6856.

Q. DID YOU TRACE THAT TAG?

A. I CALLED THE BUREAU OF MOTOR VEHICLES AND THAT TAG WAS RUN BY THEM.

Q. AND HOW DID THAT COME BACK?

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: IT CAME BACK TO DAVIS CORVETTE SALES AND SERVICE IN ASHVILLE, OHIO.

Q. (BY MS. MANGINI) WHAT DID YOU DO TO DETERMINE THE IDENTITY OF THIS INDIVIDUAL, IF ANYTHING, FROM THAT?

A. I CALLED THE PICKAWAY COUNTY SHERIFF'S DEPARTMENT AND TALKED TO A DETECTIVE BROWN AND ASKED HIM ABOUT THE DEALERSHIP. HE GAVE ME A TELEPHONE NUMBER—

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

Q. (BY MS. MANGINI) WHO DID THAT TELEPHONE NUMBER REGISTER TO?

A. I RAN THE TELEPHONE NUMBER AND CHECKED IN THE [18] HAINES CRISSCROSS DIRECTOR AND IT CAME BACK DAVIS, 7775 RIVERSIDE DRIVE IN DUBLIN, OHIO.

Q. WHOSE HOUSE WAS THAT?

A. DAVID L. DAVIS.

* * *

[28] A. MYSELF AND DETECTIVE DAUGHERTY WERE IN PLAINCLOTHES AND IN A PLAIN CAR.

Q. DID A PATROL OFFICER STOP THE DEFENDANT?

A. THERE WAS A PADDY WAGON AND A SERGEANT AND OURSELVES WHO STOPPED THE SUBJECT ON GOODALE AND WE WERE RIGHT BEHIND THEM.

Q. AND IS THAT LOCATION ON GOODALE ALSO WITHIN FRANKLIN COUNTY, OHIO?

A. YES.

Q. WHAT HAPPENED ON THE STOP OF THE DEFENDANT?

A. UPON THE STOP OF THE DEFENDANT, THE SERGEANT GOT OUT OF HIS CAR AND PROCEEDED BACK TOWARDS THE SUBJECT AS HE WAS BEGINNING TO GET OUT OF THE CAR.

Q. AND DID HE STOP HIM FROM GETTING OUT OF THE CAR AT THAT POINT?

A. YES. WHEN THEY GOT TO HIM HE WAS REMOVING HIMSELF THE REST OF THE WAY OUT OF THE CAR.

Q. AND DID YOU OBSERVE ANYTHING ABOUT THE DEFENDANT OR THE DEFENDANT'S VEHICLE AT THAT POINT?

A. AT THAT POINT I GOT OUT OF OUR CAR AND WAS BEHIND HIS AND I RAN UP TO THE PASSENGER SIDE OF THE CAR AND SAW A GUN STICKING OUT OF THE ARMREST OF THE FRONT SEAT.

Q. AND WHAT HAPPENED AT THAT POINT?

A. AT THAT POINT MR. DAVIS WAS ARRESTED FOR [29] CARRYING A CONCEALED WEAPON.

Q. WHY WAS DAVID DAVIS STOPPED INITIALLY?

A. NOT ONLY BECAUSE OF THE COMPLAINT WE HAD AND HE FIT THE DESCRIPTION, BUT BECAUSE HE JUST DROPPED OFF THE KNOWN PROSTITUTE.

Q. WAS HE UNDER ARREST AT THAT POINT?

A. NOT AT THAT TIME. WHEN HE STOPPED, NO.

Q. WAS HE EVER ADVISED BY ANYONE IN YOUR PRESENCE THAT HE WAS UNDER ARREST UNTIL SUCH TIME THAT YOU SAW THE GUN?

A. NO.

Q. AND WHO PLACED HIM UNDER ARREST FOR THE GUN CHARGE?

A. IT WOULD HAVE BEEN EITHER OFFICER CUTTERIDGE OR SERGEANT TOBIN (SIC). BOTH OF THEM WERE RIGHT THERE WHEN I WAS ON THE OTHER SIDE OF THE CAR AND WHEN I SEEN THE GUN I SAID THERE IS A GUN.

Q. AND SO YOU'RE THE ONE THAT ADVISED THEM OF THE WEAPON?

A. THAT'S CORRECT. I SAW IT STICKING OUT FROM UNDERNEATH THE ARMREST.

Q. DID YOU WITNESS THE ACTUAL ARREST?

A. THAT'S CORRECT.

* * *

[30] A. HE WAS PLACED IN BACK OF THE 48, WHICH WAS THE PADDY WAGON AT THE SCENE; AND HIS CAR WAS IMPOUNDED.

Q. WAS AN INVENTORY SEARCH OF THE CAR DONE INSTANT TO THE ARREST?

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: YES, BY OFFICER CUTTERIDGE.

Q. (BY MS. MANGINI) WHAT WAS FOUND DURING THE INVENTORY SEARCH?

MR. DEPASCALE: OBJECT, YOUR HONOR.

THE COURT: OVERRULED.

THE WITNESS: TWO MORE GUNS AND A BLACK BAG

* * *

[42] Q. SO YOU WOULD DEFINE EXPLOITED FOR THEM TO BE USED FOR WHATEVER PURPOSE?

A. THAT'S CORRECT.

Q. WOULD THAT BE WHATEVER PURPOSE THE PERSON DOING THE USING HAD?

A. IN OUR JOB MAINLY SEXUAL REASONS.

Q. HOW OFTEN DID YOU TALK TO THESE GIRLS AND I MEAN ALL THE ONES YOU WERE WORKING WITH IN THE COURSE OF YOUR DUTIES WITH THE EXPLOITED CHILDREN'S UNIT?

A. WE WOULD SEE ONE OF THESE YOUNG LADIES ON HIGH STREET AND HAVE A WARRANT ON THEM WHERE WE WERE REQUIRED TO TAKE THEM TO JAIL; AND ON THE WAY TO JAIL WE WOULD BUILD UP OVER A PERIOD OF TWO AND A HALF YEARS WHERE WE CAN PRETTY MUCH IDENTIFY OUR JUVENILE PROSTITUTE AND WE HAVE BUILT UP A RELATIONSHIP WHERE WE KNOW WHO THEY ARE AND THEY KNOW WHO WE ARE, AND

WHEN WE SEE THEM ON THE STREET, AND IF THERE IS NO WARRANT ON THEM, WE WOULD JUST PULL OVER AND TALK TO THEM TO SEE WHAT'S GOING ON. WE DO NOT MAINTAIN DAILY CONTACT BECAUSE THESE GIRLS ARE HARD TO FIND SOMETIMES, BUT WE SEE THEM OUT THERE AND WHEN WE DO WE TALK TO THEM.

MR. DEPASCALE: YOUR HONOR, MAY WE APPROACH THE BENCH?

[43] THE COURT: YES, YOU MAY.

THEREUPON, A SIDEBAR DISCUSSION WAS HELD OFF THE RECORD.

THE COURT: PROCEED.

Q. (BY MR. DEPASCALE) OKAY. SO SHOULD I UNDERSTAND FROM YOUR TESTIMONY THEN THAT YOU TALK TO THESE GIRLS EVERY TIME YOU SAW THEM?

A. IF IT'S PRACTICAL, YES.

Q. AND THAT YOU BASICALLY RAN THAT ROUTE AS A DISTRICT SORT OF SPEAKING ON A DAILY BASIS?

A. OUR UNIT WAS PUT TOGETHER TO CLEAN UP THE SHORT NORTH AREA AND THAT'S WHAT WE EMPHASIZE OUR EFFORTS ON.

MR. DEPASCALE: YOUR HONOR, I'M WEARING A WOOL SUIT AND WOULD IT BE PERMISSIBLE TO TAKE MY JACKET OFF? IT MUST BE 80 DEGREES IN HERE?

THE COURT: I'D RATHER TURN DOWN THE HEAT. IF I CANNOT TAKE OFF MY ROBE, YOU CAN'T TAKE OFF YOUR SUIT.

Q. (BY MR. DEPASCALE) AM I TO UNDERSTAND THAT WITH RESPECTS TO EACH OF THESE GIRLS THAT YOU SAW YOU KNEW THEY WERE ENGAGING IN PROSTITUTION?

A. WE KNEW THEM BECAUSE THEY WOULD HAVE A HISTORY OF ENGAGING IN PROSTITUTION?

[44] Q. YOU KNEW WHAT THEY WERE DOING FOR A LIVING?

A. THAT'S CORRECT.

Q. OKAY. DID YOU ALSO KNOW THAT THEY WERE ENGAGING IN THE USE OF DRUGS?

A. YES.

Q. YOU KNEW THEY DID THAT ON A REGULAR BASIS?

A. THAT'S CORRECT.

Q. NOW, WHAT DID YOU DO TO ARREST THESE GIRLS THAT WERE ENGAGING IN PROSTITUTION AND USING DRUGS?

A. WE DON'T ARREST THE JUVENILES THAT ARE PROSTITUTING UNLESS THEY HAVE WARRANTS OR A MISSING ON THEM, AND THEN WE ARE OBLIGATED TO TAKE THEM. YOU CANNOT ARREST THEM FOR STANDING ON HIGH STREET. YOU HAVE TO CATCH THEM IN THE ACT.

Q. STANDING ON HIGH STREET IS NOT ILLEGAL, IS IT?

A. THAT'S CORRECT.

Q. WHAT ACTION DID YOU TAKE TO DETERMINE WHERE THEY WERE FROM OR WHERE THEY BELONGED?

A. MOST OF THE GIRLS ON HIGH STREET ARE KNOWN TO THE SOCIAL WORKERS IN OUR UNIT BECAUSE MOST OF THEM THROUGH THE ROSEMONT SCHOOL FOR GIRLS; AND WE HAVE PICTURES OF THEM AND KNOW THEIR NAMES.

NOW, CHILDREN'S SERVICES DETERMINES WHERE THEY ARE FROM AND THEIR HOME SITUATION.

Q. SO YOU HAVE EITHER PERSONAL KNOWLEDGE OF OR [45] ACCESS TO THE INFORMATION ON ALL THESE GIRLS WITH RESPECTS TO THOSE AREAS?

A. AS SOON AS WE IDENTIFY WHO THE GIRL IS, THAT IS CORRECT.

Q. WHAT ACTION DID YOU TAKE TO STOP THEM FROM BEING IN A POSITION WHERE THEY WOULD DAILY ENGAGE IN PROSTITUTION AND THE USE OF DRUGS?

A. IF THE HAVE A WARRANT OR A MISSING ON THEM, WE WOULD TAKE THEM OFF THE STREET AND TAKE THEM BACK TO THEIR PLACE. IF IT'S A MINOR, THEY GO TO THE MINOR DETENTION HOME IF THEY HAVE A WARRANT, BUT UNFORTUNATELY THE ROSEMONT PLACEMENT IS NOT A LOCKUP FACILITY AND THEY'RE USUALLY OUT THE DOOR BEFORE WE ARE. SO IT'S OUT OF OUR CONTROL.

Q. AM I TO UNDERSTAND THEN YOU JUST LEAVE THEM THERE?

A. LEAVE THEM ON HIGH STREET?

Q. YES.

A. IF THEY HAVE A MISSING ON THEM OR A WARRANT ON THEM, WE JUST CAN'T LEAVE THEM THERE BECAUSE MY DUTY IS TO ARREST THEM OR APPREHEND THEM IF THEY HAVE A MISSING OUT ON THEM.

Q. BUT IF YOU SEE A GIRL, ANY GIRL THAT YOU IDENTIFY AS BEING A JUVENILE AND YOU KNOW THERE IS A NO MISSING FILE BY ANYBODY, PARENT OR AN AGENCY, AND THERE [46] IS NO WARRANT OUT ON HER FOR ESCAPE FROM THIS OR SOME OTHER PLACE, YOU WOULD JUST LEAVE HER THERE KNOWING PROBABLY THAT DAY SHE WILL ENGAGE IN PROSTITUTION AND PROBABLY USE DRUGS?

A. THERE IS NO LEGAL WAY I CAN TAKE HER OFF THE STREET. IF THERE WAS I WOULD.

Q. NOW, ARE YOU AWARE OF THE FACT THAT THE FRANKLIN COUNTY CHILDREN'S SERVICES HAS FOSTER HOMES?

A. YES.

Q. AND OTHER CARE FACILITIES?

A. THAT'S CORRECT.

Q. WHAT ACTION DO YOU TAKE THROUGH THE COURT SYSTEM TO HAVE THESE PEOPLE PUT INTO A FOSTER HOME OR OTHER FACILITIES?

MS. MANGINI: OBJECT, THAT'S NOT HER JOB.

THE COURT: REALLY, I DON'T THINK WHETHER OR NOT THAT ISSUE HERE IS FOR THAT AS TO THEIR SYSTEM, THE SYSTEM IN REGARDS TO JUVENILES, IF THEY'RE WORKING OR NOT WORKING OR DO OR DON'T DO THAT. IT'S NOT PART OF THIS MOTION, AND I BELIEVE YOU KNOW IT'S NOT PART OF THIS MOTION.

MR. DEPASCALE: YOUR HONOR, IF MAY RESPOND ASSUMING YOU'RE THROUGH.

THE COURT: YES.

MR. DEPASCALE: I BELIEVE IT IS PART OF THIS [47] MOTION. IT GOES TO THE CREDIBILITY OF THE WITNESS. I AGREE THE BOTTOM LINE ANSWER AS TO WHAT THEY DID PROBABLY IS NOT RELEVANT TO THIS MOTION, BUT THE ATTITUDE AND CREDIBILITY OF THIS WITNESS ARE PART OF THE MOTION AND A FACTOR THAT THIS COURT HAS TO MAKE A DETERMINATION ON IN ORDER TO SUSTAIN OR OVERRULE THE MOTION.

THE COURT: MOST OF THE MATTERS INVOLVED HERE ARE REALLY LEGAL QUESTIONS AS TO WHAT ACTUALLY HAPPENED AND WHAT THEY DID; AND YOU ALSO KNOW HER CREDIBILITY AS A WITNESS—I DON'T KNOW, BUT AS FAR AS THIS COURT BEING INTERESTED WHICH I AM THE FELLOW WHO IS HEARING THIS, AND YOU KNOW, AS FAR AS BEING INTERESTED IN THE PROCEDURE OR LACK OF PROCEDURES THEY HAVE IN HER GROUP OR AT ROSEMONT OR ANY JUVENILE DETENTION CENTER, THAT'S ANOTHER PROBLEM.

I'LL SUSTAIN THE OBJECTION; AND I AM READING FROM YOUR MOTION WHICH HAS NOTHING IN IT ABOUT SUCH MATTERS AT ALL.

Q. (BY MR. DEPASCALE) WHEN YOU TALK TO THESE GIRLS OUT ON THE STREET, WHAT DO YOU TALK TO THEM ABOUT?

A. WHAT THEY BEEN UP TO, WHERE THEY BEEN STAYING, WHAT THEY HAVE TO GIVE UP TO STAY THERE AND WHAT'S GOING ON OUT IN THE STREETS IN REFERENCE TO PROSTITUTION AND DRUGS.

Q. DO YOU BASICALLY PUMP THEM FOR INFORMATION?

[48] A. WE GET INFORMATION OUT OF THEM WHETHER THEY WANT TO GIVE IT TO US OR NOT IS THEIR OPTION.

Q. BUT YOUR PURPOSE IS TO GET INFORMATION FROM THEM WHEN YOU TALK TO THEM?

A. YES.

Q. AND WHATEVER YOU GET IS GREAT AND WHATEVER YOU CAN'T YOU TRY AGAIN?

A. YES.

Q. WHEN YOU RECEIVE A PIECE OF INFORMATION FROM ONE OF THESE GIRLS, WHAT DO YOU DO TO CORROBORATE IT?

A. THE FIRST THING WE DO IS WE WRITE UP A REFERRAL FROM AND WE GIVE IT TO THE LIEUTENANT. HE DETERMINES WHETHER IT IS ENOUGH TO GO FURTHER WITH IT OR NOT. IT IS NOT OUR DECISION, IT IS HIS. IF THERE IS WE THEN TRACK DOWN WHATEVER INFORMATION WE CAN TO CORROBORATE IT.

Q. AND HOW DO YOU DO THAT?

A. THROUGH RECORDS. THROUGH THE I.D. BUREAU AND THROUGH OTHER INVESTIGATIVE MEANS. TALKING TO OTHER PEOPLE, MY SOCIAL WORKER, SHE HAS ACCESS TO THEIR RECORDS AND SHE CAN PULL INFORMATION OUT OF THERE.

Q. DO YOU SOMETIMES GO TO A PLACE THAT HAS BEEN IDENTIFIED AND LOOK AROUND?

A. WE DO SURVEILLANCE.

Q. THAT WAS MY NEXT QUESTION. I NOTICE YOU CARRY A VICE/ECU DESIGNATION, AT LEAST ON YOUR

PAPERWORK SO [49] OBVIOUSLY YOU ARE USED TO DEALING WITH PEOPLE ON THIS KIND OF CONTEXT, IS THAT CORRECT?

A. I DO THAT BECAUSE MANY PEOPLE THINK WE'RE PART OF THE JUVENILE BUREAU AND WE'RE NOT, WE'RE PART OF THE VICE BUREAU.

Q. NOW, DO YOU KNOW THAT THESE PEOPLE WILL LIE, DON'T YOU?

A. THAT'S CORRECT.

Q. BASICALLY THEY WILL TELL YOU WHATEVER IT TAKES TO KEEP THEM ON THE STREET?

A. IF THEY HAVE A WARRANT AND THEY GIVE ME INFORMATION I WILL CERTAINLY NOT TAKE THEM TO JAIL. THEY WILL GO IF THEY DON'T GIVE INFORMATION IN EXCHANGE FOR NOT GOING TO JAIL OR TO A DETENTION HOME.

* * *

[55] * * *

Q. AT WHAT POINT IN TIME DURING THIS SAME TIME FRAME FOR ALL THESE QUESTIONS NOW, DID YOU ASCERTAIN THAT DAVIS HAD A GUN LICENSE?

A. THE SAME DAY I FOUND OUT THAT HE HAD, WELL, I WAS TOLD THE SAME DAY THAT I FOUND OUT WHO MR. DAVIS WAS.

Q. GIVE OR TAKE AROUND SEPTEMBER 3RD?

A. IT WOULD PROBABLY HAVE BEEN THE WEEK AFTER.

* * *

[57] Q. (BY MR. DEPASCALE) NOW, POSSESSING A GUN WITH A VALID LICENSE IS NOT ILLEGAL, IS IT?

A. NO.

Q. AND POSSESSING A NVLA CERTIFICATE IS NOT?

A. NO.

Q. BEING A SWORN POLICE OFFICER IS NOT ILLEGAL?

A. NO.

Q. DRIVING A CAR WITH A DEALER'S TAG IS NOT ILLEGAL, IS IT?

A. THERE IS SOME EXTENUATING CIRCUMSTANCES TO THAT, DEPENDING ON WHO IS DRIVING IT.

Q. IN AND OF ITSELF IT'S NOT ILLEGAL?

A. IF THE DEALER IS DRIVING IT AND FOR BUSINESS REASONS, NO, IT'S NOT ILLEGAL.

Q. DROPPING A WOMAN OFF ON A PUBLIC STREET IS NOT ILLEGAL, IS IT?

A. NO.

Q. DURING THE PERIOD OF TIME YOU FOLLOWED MR. DAVIS' CAR ON OCTOBER 2ND AND ORDERED THAT CAR BE STOPPED, WHAT TRAFFIC LAWS HAD HE VIOLATED?

A. MY RECOLLECTION IS HE HAD NOT VIOLATED ANY.

Q. DID HE VIOLATE ANY SECTION OF THE CITY CODE THAT YOU'RE AWARE OF?

A. NOT TO MY KNOWLEDGE, NO.

* * *

[59] * * *

Q. IN THE COURSE OF THIS AFFIDAVIT WHICH IS REDUCED TO WRITING BASICALLY AS YOUR SWORN TESTIMONY IN FRONT OF JUDGE MARTIN; DID YOU SAY THAT YOU HAD UNIFORMED OFFICERS STOP THE CAR TO DETERMINE THE IDENTITY OF THE DRIVER?

A. YES, THAT'S CORRECT.

Q. AND THIS AFFIDAVIT WAS MADE, GIVE OR TAKE THREE OR FIVE DAYS FROM THE ACT PERFORMED?

A. YES.

Q. IN YOUR DIRECT TESTIMONY YOU TESTIFIED CONCERNING AN INDIVIDUAL CALLED DIANE SLOAN, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. PRIOR TO OCTOBER 2ND, 1987, HAD YOU PERSONALLY ARRESTED DIANE SLOAN?

A. I HAD NOT, NO.

Q. WERE YOU PERSONALLY IN COURT ANY TIME WHEN SHE APPEARED THERE ON PROSECUTION CHARGES?

A. NO, I WAS NOT.

[60] * * *

Q. (BY MR. DEPASCALE) PRIOR TO OCTOBER 2ND, 1987, DID YOU CHECK WITH PERRY TOWNSHIP POLICE DEPARTMENT ABOUT DAVID L. DAVIS?

A. YES, I DID.

Q. SO YOU KNEW HE WAS AN AUXILIARY OFFICER?

A. YES.

Q. YOU KNEW HE WORKED WITH THAT DEPARTMENT ON A PART-TIME BASIS?

A. YES.

Q. YOU KNEW HE WORKED WARRANTS?

A. I WAS NOT TOLD THAT, NO.

Q. OKAY. PRIOR TO OCTOBER 2ND, 1987, DID YOU TAKE ANY OF YOUR INFORMANTS UP TO THE GUN STORE AND HAVE THEM IDENTIFY MR. DAVIS?

A. NO, I DID NOT.

[61] Q. DID YOU TAKE THEM TO PERRY TOWNSHIP POLICE DEPARTMENT TO HAVE THEM IDENTIFY MR. DAVIS?

A. NO, I DID NOT.

Q. DID YOU TAKE THEM TO 7775 RIVERSIDE DRIVE AND HAVE THEM IDENTIFY MR. DAVIS?

A. NO, SIR.

Q. IN FACT, THE ONLY POSITIVE SO-CALLED IDENTIFICATION YOU EVER HAD DONE IN THIS CASE WAS OUTSIDE THIS COURTROOM THREE OR FOUR DAYS AGO?

A. THAT'S CORRECT.

* * *

[66] * * *

Q. TELL ME WHAT YOU SAW?

A. OKAY. WHAT I SAW UPON STOPPING THE CAR WAS SERGEANT TOBIN, WHICH WAS THE ONE THAT GOT OUT OF HIS VEHICLE FIRST, STARTED BACK TOWARDS THE DRIVER'S SIDE OF MR. DAVIS' CAR. MR. DAVIS STARTED TO GET OUT AND OFFICER TOBIN, FOR HIS OWN SAFETY—

MR. DEPASCALE: YOUR HONOR, I'M GOING TO OBJECT TO THIS—

THE COURT: OKAY, ALL RIGHT. JUST TELL US WHAT YOU SAW.

THE WITNESS: OFFICER TOBIN TOOK MR. DAVIS THE REST OF THE WAY OUT OF THE VEHICLE.

Q. (BY MR. DEPASCALE) HOW FAR OUT OF THE VEHICLE WAS MR. DAVIS WHEN SERGEANT TOBIN PUT HIS HANDS ON HIM?

A. I CAN'T TELL YOU EXACTLY, I DON'T KNOW.

Q. WHEN YOU SAW OFFICER TOBIN OR WHEN HE TOOK HIM OUT OF THE VEHICLE, YOU MEAN HE GRABBED HIM, DON'T YOU?

A. NO, HE MAY HAVE PUT HIS HANDS ON HIM TO HELP HIM OUT.

Q. HE PUT HIS HANDS ON HIM IN SOME FORM?

A. YES. TO ASSIST HIM OUT OF THE CAR, YES.

[67] Q. WHERE WERE YOU AT THAT POINT?

A. GETTING OUT OF THE PASSENGER SIDE OF DETECTIVE DAUGHERTY'S CAR.

Q. WHERE DID YOU GO THEN?

A. I PROCEEDED TO THE PASSENGER DOOR OF MR. DAVIS' CAR.

Q. NOW, WHILE YOU WERE—WELL, WHILE YOU WERE WALKING THIS ROUTE FROM YOUR CAR TO MR. DAVIS' CAR, THE SERGEANT IS GETTING DAVIS OUT OF THE CAR, IS THAT CORRECT?

A. TO THE BEST OF MY RECOLLECTION, YES.

Q. OKAY. AND THEN THEY CLOSED THE DRIVER'S SIDE DOOR TO KEEP CARS FROM RUNNING OVER IT?

A. YES, I IMAGINE SO, BECAUSE THERE WAS TRAFFIC GOING BY, YOU KNOW, THEY WEREN'T GOING BY FAST BECAUSE EVERYONE WANTED TO LOOK.

Q. I UNDERSTAND THAT, NOW, YOU'RE STANDING OUTSIDE DAVIS' CAR, THEN WHAT DID YOU DO?

A. I LOOKED IN THE PASSENGER WINDOW FROM OUTSIDE OF THE CAR AND SAW A BUTT OF A GUN STICKING OUT BETWEEN THE ARMREST BETWEEN THE TWO FRONT SEATS.

Q. YOU COULD CLEARLY RECOGNIZE THE GUN?

A. IT WAS AN AUTOMATIC WEAPON AND I SAW THE CLIP IN THE HANDLE.

* * *

[68] IT WAS AN AUTOMATIC WEAPON?

A. YES.

Q. OKAY. DID YOU SAY ANYTHING TO SERGEANT TOBIN AT THAT POINT?

A. I SAID THERE WAS A GUN IN THE FRONT SEAT.

Q. OKAY AT THAT POINT YOU HAD MR. DAVIS' CAR STOPPED AND HE WAS NOT FREE TO GO, WAS HE?

A. YOU MEAN HAD HE FLED—

Q. THE QUESTION IS HE WAS NOT FREE TO LEAVE?

A. BEFORE HIS ARREST I WOULD SAY NO.

Q. OKAY—

A. AFTER HE WAS ARRESTED, DEFINITELY NOT.

Q. OKAY. WHEN YOU USE THE TERM ARRESTED, DO YOU MEAN YOU TOLD HIM, "YOU ARE UNDER ARREST"? DO YOU MEAN YOU USED THOSE WORDS, I ASSUME?

A. I WASN'T THE ONE THAT SAID THEM. AT THAT POINT HE WAS TOLD HE WAS UNDER ARREST OR I PRESUME HE WAS TOLD. I WASN'T ON THAT SIDE OF THE CAR.

Q. YOU DIDN'T HEAR HIM BEING TOLD HE WAS UNDER ARREST?

A. NO, I WAS NOT ON THAT SIDE OF THE CAR.

Q. WHEN YOU LOOK INTO THE WINDOW OF THE CAR, HOW MANY WEAPONS, HOW MANY GUNS DID YOU SEE?

A. I COULD ONLY SEE ONE, THE ARMREST WAS DOWN.

Q. WERE YOU AWARE ON OCTOBER 2ND AT THE TIME THIS [69] STOP WAS MADE THAT DAVID DAVIS HAS A FEDERAL CLASS THREE GUN LICENSE?

A. YES.

Q. SO HE WAS AUTHORIZED BY THE FEDS TO OWN AN AUTOMATIC FIREARM AS WELL AS OTHER FIREARMS?

MS. MANGINI: ARE YOU ASKING NOW OR THEN?

Q. (BY MR. DEPASCALE) AT THE TIME THE STOP WAS MADE?

A. I KNEW IT AT THE TIME.

* * *

[71]

* * *

A. YES.

Q. THE BOTTOM LINE IS THE TRAFFIC WAS VERY HEAVY?

A. IT WAS AROUND THE RUSH HOUR, YES.

Q. DO YOU REMEMBER WHO COINED THE TERM "INJECTOR MAN", AND WHEN IT WAS SO COINED?

A. RENEE CASPER ALSO KNOWN AS NICKIE BUTLER WAS THE ONE THAT COINED IT. I THINK SHE TOLD IT TO OFFICER MALLOY (SIC), ON OCTOBER 2ND, 1987.

* * *

APPENDIX P

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE:

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without *due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by *an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX Q

STATUTES INVOLVED

Ohio Revised Code §2923.12
"Carrying concealed weapons."

§2923.12 Carrying concealed weapons.

(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance.

(B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of their duties.

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon his home, such as would justify a prudent man in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in his own home.

(4) The weapon was being transported in a motor vehicle for any lawful purpose, and was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable requirements of division (C) of section 2923.16 of the Revised Code.

(D) Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm and the violation of this section is committed at premises for which a D permit has been issued under Chapter 4303, of the Revised Code, if the weapon involved is a firearm which is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, then carrying concealed weapons is a felony of the third degree. If the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons is a felony of the second degree.

APPENDIX R

OHIO RULES OF CRIMINAL PROCEDURE

RULE 29. Motion for Acquittal

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.